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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906

No. [redacted]28.

NORTH AMERICAN COLD STORAGE COMPANY,
APPELLANT,

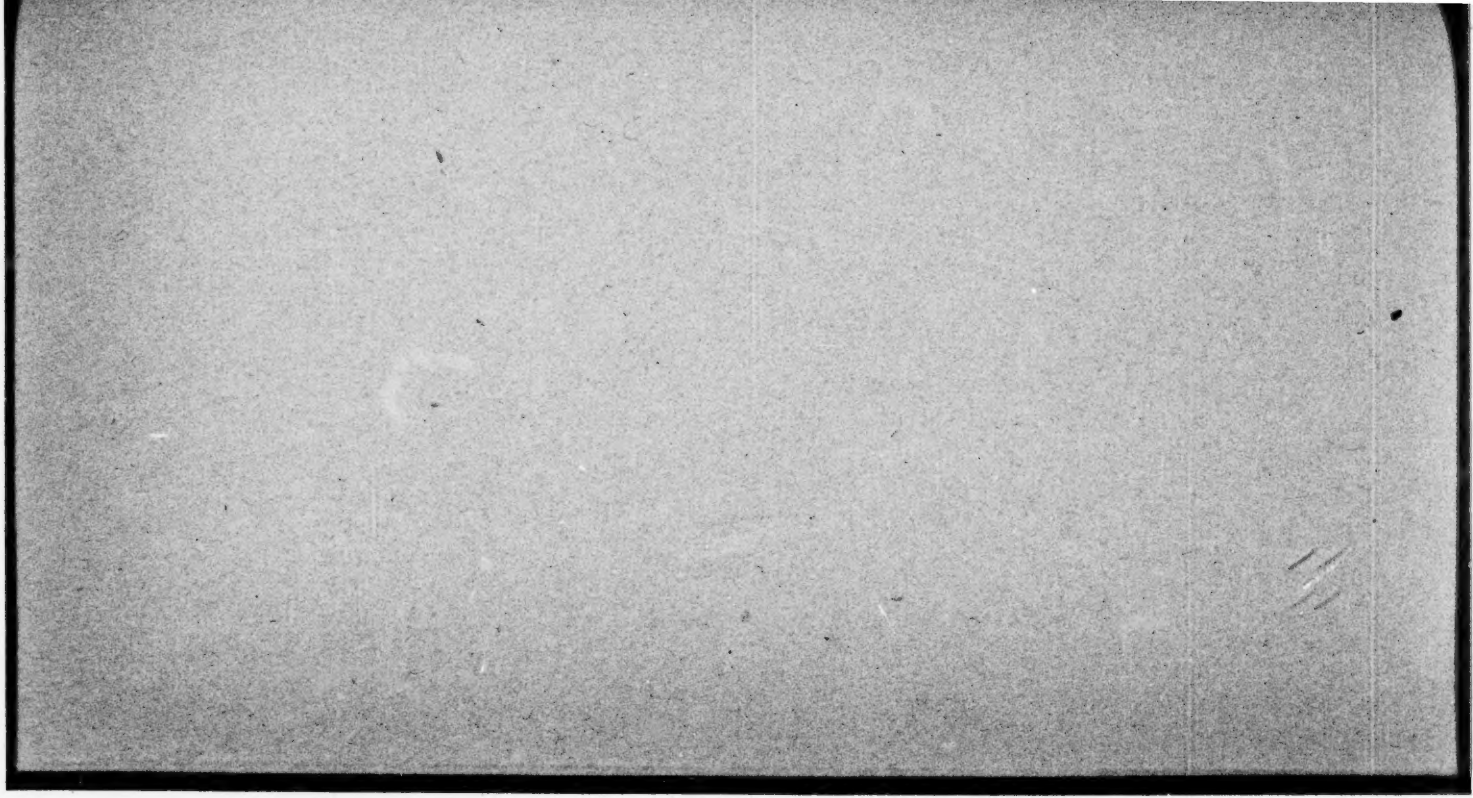
vs.

THE CITY OF CHICAGO ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED FEBRUARY 23, 1907.

(20,587.)



(20,587.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 622

NORTH AMERICAN COLD STORAGE COMPANY, APPELLANT,

vs.

THE CITY OF CHICAGO ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1907.

1 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Chancery. 28416.

NORTH AMERICAN COLD STORAGE COMPANY
vs.
CITY OF CHICAGO, CHARLES J. WHALEN, as Commissioner of Health of the City of Chicago, *et al.*

Mr. L. A. Stebbins, Mr. John M. Curran, Solicitors for Complainant.
Mr. James Hamilton Lewis, Mr. Leon Hornstein, Solicitors for City of Chicago and Charles J. Whalen.

2 Pleas in the Circuit Court of the United States for the Northern District of Illinois—Eastern Division in Chancery sitting, at the United States Court room, in the City of Chicago, in said District and Division, before the Hon. Christian C. Kohlsaat, Circuit Judge of the United States for the Seventh Judicial Circuit, on Thursday, the thirty-first day of January, in the year of our Lord one thousand nine hundred and seven, being one of the days of the regular December term of said Court, 1906, and of our independence the one hundred and thirty-first year.

MARSHALL E. SAMPSELL, *Clerk*.

3 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28416.

NORTH AMERICAN COLD STORAGE COMPANY
vs.
CITY OF CHICAGO, CHARLES J. WHALEN, as Commissioner of Health of the City of Chicago; EDWARD R. PRITCHARD, as Secretary of the Department of Health of the City of Chicago; PATRICK J. MURRAY, as Chief Food Inspector of the Department of Health of the City of Chicago; THOMAS KELLY and JOHN R. BATCH, as Inspectors of the Department of Health of the City of Chicago; JAMES D. DOUGHERTY, as Lieutenant of Police of the City of Chicago; P. H. DAWSON, as Sergeant of Police of the City of Chicago, and ALBERT PUGNER, GEORGE MURPHY, CHRISTOPHER FOLEY, MICHAEL HANRAHAN, JOHN CASEY, JAMES DUNNE, FRANK WALSH, EUGENE MCWILLIAMS, JOHN WEISE, and WILLIAM MAHONEY, as Patrolmen of the City of Chicago.

Be it remembered that on this day to-wit: the third day of October, 1906, come the complainant in the above entitled cause by its solicitor, Mr. L. A. Stebbins and filed in the clerk's office of said

Court its certain Bill of Complaint in words and figures following to-wit:

4 *Bill of Complaint.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

To the Judges of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division:

North American Cold Storage Company, a corporation and a citizen of the State of Illinois, and of the Northern District and Eastern Division thereof, brings this, its bill, against the City of Chicago, Charles J. Whalen, as Commissioner of Health of the City of Chicago, Edward R. Pritchard, as Secretary of the Department of Health of the City of Chicago, Patrick J. Murray, as Chief Food Inspector of the Department of Health of the City of Chicago, Thomas Kelly and John R. Batch, as Inspectors of the Department of Health of the City of Chicago, James D. Dougherty, as Lieutenant of Police of the City of Chicago, P. H. Dawson, as Sergeant of Police of the City of Chicago, and Albert Pugner, George Murphy, Christopher Foley, Michael Hanrahan, John Casey, James Dunne, Frank Walsh, Eugene McWilliams, John Weise and William Mahoney, as Patrolmen of the City of Chicago, each and all of whom are citizens of the State of Illinois, and of the Northern District and Eastern Division thereof; and thereupon your orator complains and says:

5 That it is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois; that the defendant, the City of Chicago, is a municipal corporation, duly organized and existing under and by virtue of the laws of the State of Illinois; that the defendant, Charles J. Whalen, is the duly appointed, qualified and acting Commissioner of Health of the said City of Chicago; that the defendant, Edward R. Pritchard, is the duly appointed, qualified and acting Secretary of the Department of Health of said City of Chicago; that the defendant, Patrick J. Murray, is the duly appointed, qualified and acting Chief Food Inspector of the Department of Health of the City of Chicago; that the defendants, Thomas Kelly and John R. Batch, are duly appointed, qualified and acting Inspectors of the Department of Health of the City of Chicago; that the defendant, James D. Dougherty, is a duly appointed, qualified and acting Lieutenant of police of the City of Chicago; that the defendant, P. H. Dawson, is a duly appointed, qualified and acting Sergeant of police of the City of Chicago; that the defendants, Albert Pugner, George Murphy, Christopher Foley, Michael Hanrahan, John Casey, James Dunne, Frank Walsh, Eugene McWilliams, John Weise and William Mahoney, are duly appointed, qualified and acting patrolmen of the City of Chicago.

That the matter in dispute herein, exclusive of interest and costs,

exceeds the sum or value of Two Thousand Dollars ($2,000.00), and this cause arises under the Constitution of the United States.

Your orator further complainaing says that under its Articles of Incorporation it is authorized to own, operate and conduct a warehouse and cold storage business.

6 Your orator further complaining says that it owns at No. 109 North Canal Street, in the City of Chicago, Cook County, Illinois, a warehouse and cold storage plant, sixteen stories high, worth more than Five Hundred Thousand Dollars ($500,000.00); that at such place and in and by means of said cold storage plant, it conducts a warehouse and cold storage business, and has conducted said business at said place for more than one year last past; that in conducting said business your orator has at all times complied with and is now in all respects complying with the laws of the State of Illinois and the ordinances of the City of Chicago, relative to its said business and plant; that said business is of great volume and of great value; that it consists of receiving and storing food products and goods as bailee for hire; that it receives in the conduct of its said business on an average of Twenty Thousand Dollars ($20,000) worth of goods per day, and on an average returns to its customers Twenty Thousand Dollars ($20,000) worth of goods per day; that it now has in storage about Two Million Dollars worth of goods.

Your orator further complaining says that it has and for some time last past has had forty-seven barrels of poultry in cold storage in its said plant, received in due course of business from one F. A. Becker, a wholesale produce merchant of the said City of Chicago, doing business under the firm name and style of F. A. Becker & Company.

Your orator further complaining says that it is informed and believes, and therefore charges the fact to be that said poultry is in a clean and wholesome condition and that the same has not become putrid, decayed, poisoned *of* infected, or in any other manner rendered or made unsafe or unwholesome for human food.

7 Your orator further complaining says that said poultry is now and ever since it has been in said plant has been in cold storage at so low a temperature that it would be impossible for it to and it has not changed its condition since it was received for storage; that it is not now being offered for sale; that it was not about to be taken out of your orator's plant when demanded by the defendants, and that at the temperature at which it was kept in cold storage by your orator the same would remain unchanged as to its condition for more than three months; that there was no occasion for any haste in the destruction of the same if it were in any wise unfit for food, and that there is in all respects ample time for a thorough investigation and judicial determination of the question as to whether or not the same is fit for food. That the reasonable market value of the same is more than Three Thousand Dollars ($3,000.00), and that your orator has agreed with the said F. A. Becker, doing business under the firm name and style of F. A. Becker & Company, to keep said poultry and deliver the same to him,

the said F. A. Becker, on demand, and to no other person, except upon his order.

Your orator further complaining says that on the second day of October, 1906, about four o'clock in the afternoon of said day, the defendants, Thomas Kelly, John R. Batch, James D. Dougherty, P. H. Dawson, Albert Pugner, George Murphy, Christopher Foley, Michael Hanrahan, John Casey, James Dunne, Frank Walsh, Eugene McWilliams, John Weise and William Mahoney, acting under the direction of the defendants, Charles J. Whalen and Edward R. Pritchard, as Commissioner and Secretary aforesaid, appeared at your orator's said warehouse, and demanded of your orator that your orator forthwith deliver to them the said forty-seven barrels of poultry so as aforesaid received by your orator from the said
F. A. Becker, doing business under the firm name and style
8 of F. A. Becker & Company, to be by them then and there forthwith destroyed as being unfit for human food.

Your orator further complaining says that immediately upon said demand your orator was notified by the said F. A. Becker that the said poultry was clean and wholesome, that he would hold your orator strictly accountable for the safe keeping thereof, and forbade your orator to deliver the same to the said defendants, or to any other person than him, the said F. A. Becker, or such person as he might designate.

Your orator further complaining says that the said defendants demanded the said poultry for the purpose of destroying the same and were about to destroy the same.

Your orator further complaining says that the said City of Chicago and each and all of its officers, servants, agent and employés aforesaid, made defendants herein, in demanding the said poultry and in attempting to destroy the same, claimed to be acting and were acting under and in pursuance of the provisions of Section 1161 of the Revised Municipal Code of the City of Chicago, 1905, which reads as follows:

"Every person being the owner, lessee or occupant of any room, stall, freight house, cold storage house or other place, other than a private dwelling, where any meat, fish, poultry, game, vegetables, fruit, or other perishable article adapted or designed to be used for human food, shall be stored or kept whether temporarily or otherwise, and every person having charge of, or being interested or engaged, whether as principal or agent, in the care of or in respect to the custody or sale of any such article of food supply, shall put, preserve and keep such article of food supply in a clean and wholesome condition, and shall not allow the same, nor any part thereof, to become putrid, decayed, poisoned, infected, or in any other manner rendered or made unsafe or unwholesome for human food; and it shall be the duty of the meat and food inspectors and other duly authorized employés of the health department of the city to enter any and all such premises above specified at any time of any day, and to forthwith *sieze*, condemn and destroy any such putrid, decayed, poisoned and infected food, which any such inspector may find in and upon said premises."

Your orator further alleges that there is no other law or ordinance of the City of Chicago authorizing or purporting to authorize the said defendants or any of them to take such action, other than the said ordinance last above quoted.

9 Your orator further complaining says that in fulfillment of its contractual duty as bailee aforesaid, and being advised by counsel, and claiming and believing that said Section 1161 of the Revised Municipal Code of Chicago, 1905, in so far as the same attempts to authorize the said City of Chicago, its agents, servants and employés, to *sieze*, condemn or destroy food or other products, is in conflict with that portion of the Fourteenth Amendment to the Constitution of the United States, which provides that "No state shall make or enforce any law which * * * deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," it then and there declined to permit the said defendants to take or destroy the said poultry, whereupon the said defendants, Thomas Kelly and John R. Batch, James D. Dougherty, P. H. Dawson, Albert Pugner, George Murphy, Christopher Feley, Michael Hanrahan, John Casey, James Dunne, Frank Walsh, Eugene McWilliams, John Weise and William Mahoney, acting under the direction of the said Charles J. Whalen and Edward R. Pritchard, stated, threatened and announced that they would not permit said cold storage warehouse business to be further conducted until your orator complied with their demand to deliver up the said poultry as aforesaid; that they would not permit any more goods to be received into said warehouse and cold storage plant, or any more goods of any kind or character to be taken out of said warehouse and cold storage plant, and that they would arrest and imprison any person who attempted to receive or assist in receiving any goods into said warehouse and cold storage plant, or who took or assisted in taking any goods out of the same, until your orator complied with said demand as aforesaid.

Your orator further complaining says that pursuant to said statement, threat and announcement, they, the said defendants,

10 have taken possession of your orator's plant, and have prevented any goods from being received and any goods from being taken out.

Your orator further complaining says that it has in storage many perishable products; that it is receiving nearly every hour of every day that it transacts business perishable products, for cold storage; that the stoppage of its business as now maintained by force by the said defendants will do your orator great and irreparable damage and will do great and irreparable damage to your orator's patrons, and that the destruction of said poultry would do your orator great and irreparable damage. That since the said defendants took forcible possession of your orator's business as aforesaid, about a dozen of your orator's patrons have demanded perishable goods stored with your orator, amounting in value to a sum in excess of Two Thousand Dollars ($2,000.00), and your orator has been unable to deliver the same because prevented by the said defendants as aforesaid; that since the said defendants have taken forcible possession of your ora-

tor's business as aforesaid, your orator has received notifications from its patrons that a large amount of food products would be delivered to your orator at its warehouse and cold storage plant for cold storage, immediately upon the opening of business upon the 3rd day of October, 1906, among other products a carload of meats from Nelson Morris & Company, demanding immediate cold storage in order to preserve the same; that your orator is unable to receive any of said goods, because forcibly prevented from doing so by the said defendants as aforesaid. That all of the said last mentioned goods being demanded by the patrons of your orator is good and wholesome; that there has been no claim by the Health Department of the City of Chicago that the same is in anywise unfit for food; that all
11 of said food now tendered for storage as aforesaid is wholesome, as your orator is informed and verily believes and that no claim is being made by the Health Department of the City of Chicago that the same is otherwise; that none of said food now demanded is stored with or anywhere near or upon the same floor with said poultry, nor is any of said food now tendered for storage designed to be stored near or upon the same floor with said poultry.

Your orator further complaining says that the said defendants and each of them, in taking forcible possession of your orator's business as aforesaid and in threatening to retain said forcible possession of same until your orator has complied with the demand of said defendants, are claiming to act under and pursuant to the provisions of said Section 1161 of the Revised Municipal Code of Chicago, 1905. Your orator further complaining says that said Section 1161 of the Revised Municipal Code of Chicago, 1905, and each and all of the other ordinances of the City of Chicago, insofar as it or they attempt to authorize the said City of Chicago, its officers, agents, servants or employés to seize, condemn or destroy food claimed to be putrid, decayed, poisoned or infected, without any judicial determination of the fact of the same being putrid, decayed, poisoned or infected, is in conflict with that portion of the Fourteenth Amendment to the Constitution of the United States, which provides that "no state shall make or enforce any law which * * * deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In consideration whereof and forasmuch as your orator can have no adequate relief, except in a court of equity, and to the end
12 that the defendants may, if they can, show why your orator should not have the relief prayed and may make a full disclosure and discovery of all the matters aforesaid, according to the best and utmost of their knowledge, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated, but not under oath, answer under oath being hereby expressly waived.

Your orator prays that that portion of Section 1161 of the Revised Municipal Code of Chicago, 1905, which attempts to authorize the seizure, condemnation and destruction of food claimed to be putrid, decayed, poisoned or infected, without a judicial determina-

tion of the fact that the same is putrid, decayed, poisoned or infected, be declared null and void, as being in conflict with the Fourteenth Amendment to the Constitution of the United States, and that the said defendants and each of them, their agents, servants and employés, be restrained and enjoined, until the further order of this court, from taking or removing the said poultry from the said warehouse or from destroying the same, and that they be further restrained and enjoined from preventing your orator from delivering its goods held in storage to its customers, in due course of business, and that they be further restrained and enjoined from preventing your orator from receiving goods for storage, and that they be further restrained and enjoined from in any wise interfering with your orator's business, or preventing the further conduct of your orator's business in the usual and ordinary way, and that upon final hearing said injunction be made permanent, and for such other and further relief as may be agreeable to equity and good conscience.

May it please your honors to grant unto your orator a writ of subpœna of the United States of America, directed to the said City of Chicago, Charles J. Whalen, Edward R. Pritchard, Patrick J. Murray, Thomas Kelly, John R. Batch, James D. Dougherty,
13 P. H. Dawson, Albert Pugner, George Murphy, Christopher Foley, Michael Hanrahan, John Casey, James Dunne, Frank Walsh, Eugene McWilliams, John Weise and William Mahoney, commanding them on a day certain to appear and answer unto the bill of complaint, and to do and perform such other decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

L. A. STEBBINS,
JOHN M. CURRAN,
Solicitors for Complainant.

NORTH AMERICAN COLD STORAGE CO.,
By L. A. STEBBINS, *Its Solicitor.*

14 STATE OF ILLINOIS, *County of Cook, ss:*

M. Denman, being first duly sworn, says that he is General Manager of the North American Cold Storage Company, and as such is authorized to make this affidavit on its behalf; that he has read the foregoing bill and knows the contents thereof, and that the statements and allegations therein contained are true, except such as are made upon information and belief, and as to such allegations and statements, he verily believes the same to be true.

M. DENMAN.

Subscribed in my presence and sworn to before me this 3rd day of October, A. D. 1906.

C. M. CURRIE,
[SEAL.] *Notary Public.*

My Commission expires March 3, 1909.

(Endorsed:) Filed Oct. 3, 1906. Marshall E. Sampsell, Clerk.

15 And on the same day to-wit: the third day of October, 1906, being one of the days of the regular July term of said Court, 1906, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Order of October 3, 1906.

28416.

NORTH AMERICAN COLD STORAGE CO.
vs.
CITY OF CHICAGO ET AL.

Now come the parties by their solicitors and by agreement of counsel in open court that no steps will be taken to divest the possession of the City to the property mentioned in said bill, the motion of the complainant for a preliminary injunction is hereby postponed until Tuesday morning next.

16 And on to-wit: the sixth day of October, 1906, come the complainant in said entitled cause by its solicitors and filed in the clerk's office of said Court its certain Amendment to Bill in words and figures following to-wit:

17 *Amendment to Bill.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 28416.

NORTH AMERICAN COLD STORAGE COMPANY, Complainant.
vs.
THE CITY OF CHICAGO ET AL., Defendants.

Amendment to Bill.

Comes now your orator, the North American Cold Storage Company, and makes the following addition to its bill, by way of amendment:

Insert after the word "laws," in the 28th line of the 8th folio of complainant's bill of complaint, the following:

"Your orator further complaining says that the defendants, especially the said City of Chicago, Charles J. Whalen, Commissioner of Health of the Department of Health of the City of Chicago, Edward R. Pritchard, Secretary of the Department of Health of the City of Chicago, and Patrick J. Murray, as Chief Food Inspector of the Department of Health of the City of Chicago, claim the right

under said Section 1161 of the Revised Municipal Code of the City of Chicago, 1905, to summarily destroy from time to time any and all products stored in the said warehouse and cold storage plant of your orator, which they or either of them may condemn as being putrid, decayed, poisoned or infected, or unfit for human food, without any judicial determination of the fact that such products are in such condition, and they, the said defendants, are now threatened to summarily destroy, from time to time, pursuant to the provisions of said Section 1161 of the Revised Municipal Code of Chicago, 1905, any and all food products which may be con-
18 demned by them or either of them as being putrid, decayed, poisoned or infected, or unfit for human food, without any judicial determination of the fact that such products are in such condition."

Insert after the word "permanent," in the 25th line of the 9th folio of complainant's bill of complaint, the following:

"Wherefore, your orator, in addition to the relief already prayed for, prays that the said defendants be restrained and enjoined, until further order of the court, from seizing, or destroying any products stored by your orator in its said warehouse and cold storage plant, condemned by them or either of them as being putrid, decayed, poisoned or infected, or unfit for human food, without judicial determination of the fact that such products are in such condition, and that upon final hearing said injunction be made permanent."

NORTH AMERICAN COLD STORAGE COMPANY,
By L. A. STEBBINS,
JOHN M. CURRAN, *Its Solicitors.*

(Endorsed:) Filed Oct. 6, 1906, Marshall E. Sampsell Clerk.

19 And on to-wit: the fifteenth day of October, 1906, being one of the days of the regular July term of said Court, 1906, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Order of October 15, 1906.

28416.

NORTH AMERICAN COLD STORAGE COMPANY
vs.
CITY OF CHICAGO ET AL.

By agreement of counsel, the motion for a preliminary injunction herein is postponed until November 14th next.

20 And on to-wit: the thirty-first day of October, 1906, come Charles J. Whalen, Commissioner of Health of the City of Chicago by his solicitors and filed in the clerk's office of said Court

in said entitled cause his certain Demurrer to the Bill of Complaint in words and figures following to-wit:

Demurrer of Charles J. Whalen.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28416.

NORTH AMERICAN COLD STORAGE COMPANY, Complainant,
vs.
THE CITY OF CHICAGO ET AL., Defendants.

The Demurrer of Charles J. Whalen, Commissioner of Health of the City of Chicago, one of the defendants in the above entitled cause, to the bill of complaint of North American Cold Storage Company, complainant.

This defendant by protestation not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill and for cause of demurrer shows the following:

21 1. It appears from the face of the said bill that the Court has no jurisdiction of the parties to the said bill.

2. It appears from the face of said bill that the Court has no jurisdiction of the subject matter contained therein.

3. It appears from the face of said bill that the amount involved is not sufficient to give the court jurisdiction.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant demurs to the said bill and to all the matters and things therein contained, and prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill, and it prays to be dismissed with its reasonable costs in this behalf most wrongfully sustained.

CHARLES J. WHALEN,
Commissioner of Health of the City of Chicago.
By JAMES HAMILTON LEWIS,
Corporation Counsel, and
LEON HORNSTEIN,
Assistant Corporation Counsel,
Solicitors for said Defendant.

I hereby certify that in my opinion the foregoing Demurrer of Charles J. Whalen, Commissioner of Health of the City of Chicago one of the defendants to the bill of complaint of North American Cold Storage Company, complainant, is well founded in law and proper to be filed in the above cause.

LEON HORNSTEIN,
Assistant Corporation Counsel,
Solicitor for Defendant.

22 STATE OF ILLINOIS, *County of Cook, ss:*

Charles J. Whalen, being first duly sworn deposes and says, that as Commissioner of Health of the City of Chicago, he is one of the defendants in the above entitled cause.

Affiant further states that he has heard read the foregoing demurrer to the bill of complaint of North American Cold Storage Company in said cause, and that the same is not interposed for the purpose of delaying said suit, or any proceedings therein.

CHARLES J. WHALEN.

Subscribed and sworn to before me, this 31st day of October, A. D. 1906.

C. H. PERRIGO,
[SEAL.] *Notary Public.*

(Endorsed:) Filed October 31, 1906. Marshall E. Sampsell, Clerk.

23 And on to-wit: the third day of November, 1906, come the City of Chicago by its solicitors and filed in the clerk's office of said Court in said entitled cause its certain Demurrer to the Bill of Complaint in words and figures following to-wit:

Demurrer of the City of Chicago.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28416.

NORTH AMERICAN COLD STORAGE COMPANY, Complainant,
vs.
THE CITY OF CHICAGO ET AL., Defendants

The Demurrer of the City of Chicago, one of the defendants in the above entitled cause to the bill of complaint of North American Cold Storage Company, Complainant.

This defendant by protestation not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill and for cause of demurrer shows the following:

24 1. It appears from the face of the said bill that the Court has no jurisdiction of the parties to the said bill.

2. It appears from the face of said bill that the Court has no jurisdiction of the subject matter contained therein.

3. It appears from the face of said bill that the amount involved is not sufficient to give the court jurisdiction.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant demurs to the said bill and to all the matters and things therein contained, and prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill, and it prays to be dismissed with its reasonable costs in this behalf most wrongfully sustained.

CITY OF CHICAGO,
By JAMES HAMILTON LEWIS,
Corporation Counsel, and
LEON HORNSTEIN,
Assistant Corporation Counsel,
Solicitors for said Defendant.

I hereby certify that in my opinion the foregoing demurrer of the City of Chicago, one of the defendants to the bill of complaint of North American Cold Storage Company, complainant, is well founded in law and proper to be filed in the above cause.

LEON HORNSTEIN,
Assistant Corporation Counsel,
Solicitor for Defendant.

25 STATE OF ILLINOIS, *County of Cook, ss:*

Charles J. Whalen being first duly sworn, deposes and says, that he is the Commissioner of Health of the City of Chicago; that he is the head of the department which is most vitally interested in the above entitled cause; that he is as Commissioner of Health of said City one of the defendants in said cause and that he makes this affidavit for and on behalf of the defendant, City of Chicago, as the head of the department of Health and as being most conversant with the merits of the controversy in said cause.

Affiant further states that he has heard read the foregoing demurrer to the bill of complaint of North American Cold Storage Company in said cause, and that the same is not interposed for the purpose of delaying said suit, or any proceedings therein.

CHARLES J. WHALEN.

Subscribed and sworn to before me, this 2d day of November A. D. 1906.

WILSON O. STAHL,
[SEAL.] *Notary Public.*

(Endorsed:) Filed Nov. 3, 1906. Marshall E. Sampsell, Clerk.

26 And on to-wit: the fourteenth day of November, being one of the days of the regular July term of said Court, 1906, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to wit:

Order of November 14, 1906.

28416.

NORTH AMERICAN COLD STORAGE CO.
vs.
CITY OF CHICAGO ET AL.

Now come the parties by their solicitors and now comes on to be heard the demurrer to the bill of complaint herein and the Court having heard the arguments of counsel to conclusion and not being sufficiently advised in the premises takes time to consider, with leave to the defendants to file brief within five days, the complainant to have five days after to reply.

27 And on to-wit: the thirty-first day of January, 1907, there was filed in the clerk's office of said Court in said entitled cause a certain Opinion in words and figures following to-wit:

28 *Opinion.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 28416.

NORTH AMERICAN COLD STORAGE COMPANY
vs.
CITY OF CHICAGO ET AL.

KOHLSAAT, *J.*:

Bill to restrain defendants from alleged interference with complainant's business by threatened arrests, refusal to allow goods to be received at its warehouse, the seizure and threatened condemnation and destruction of certain barrels of poultry, and threats of similar acts in the future. The bill alleges that the defendants in committing the acts and making the threats complained of, claimed to be and were acting under and by virtue of Section 1161 of the Revised Municipal Code of the City of Chicago, 1905, which is set out in the bill as follows:

"Every person being the owner, lessee or occupant of any room, stall, freight house, cold storage house or other place, other than a private dwelling, where any meat, fish, poultry, game, vegetables, fruit, or other perishable article adapted or designed to be used for human food, shall be stored or kept whether temporarily or otherwise, and every person having charge of, or being interested or engaged, whether as principal or agent, in the care of or in respect to the custody or sale of any such article of food supply, shall put, preserve and keep such article of food supply in a clean and wholesome condition, and shall not allow the same, nor any part thereof,

to become putrid, decayed, poisoned, infected, or in any other manner rendered or made unsafe or unwholesome for human food; and it shall be the duty of the meat and food inspectors and other duly authorized employes of the health department of the city to enter any and all such premises above specified at any time of any day, and to forthwith seize, condemn and destroy any such putrid, decayed, poisoned and infected food, which any such inspector may find in and upon said premises."

29 It is further alleged that this ordinance "in so far as it attempts to authorize the City of Chicago, its agents, servants and employés, to seize, condemn or destroy food or other products, is in conflict with the Fourteenth Amendment of the Constitution of the United States."

The cause is now before the court on demurrer to the bill. In support of the demurrer, it is urged, among other things that the court is without jurisdiction (1) because it appears from the bill that the amount involved is less than two thousand dollars, exclusive of interest and costs, and (2) because it appears from the bill that there is no constitutional question involved. As to the first objection: The bill contains an allegation that "the matter in dispute herein, exclusive of interest and costs, exceeds the sum of two thousand dollars * * *." There is nothing in the bill to contradict this allegation. Defendants, however, contend that inasmuch as it appears in the bill that complainant is a warehouseman, and not the owner of the goods in question, its interest in the way of commissions and charges cannot amount to two thousand dollars. But it does not appear from the bill whether complainant bases his allegation of amount on the value of the goods, the value of its commissions and charges, or the damage that may be done its business by the acts of defendants. The allegation may well have been based upon any or all of these elements. But even assuming the correctness of defendant's contention that the amount of complainant's personal interest in the way of commissions and charges is alone the proper basis for determining the amount involved, the court cannot say from the face of the bill that the amount of complain-

30 ant's commissions is not two thousand dollars. While the allegations of the bill taken as a whole might make it unreasonable to suppose that the commissions of complainant upon the particular goods seized amount to two thousand dollars, the court cannot take judicial notice of the amount of such commissions. The reasonableness of such allegation cannot be inquired into on demurrer. The court, therefore, holds that the general allegation of amount above quoted is sufficient.

As to the second objection: Defendant contends that it does not appear from the bill that the ordinance pleaded is based upon state authority—that the provision of the Fourteenth Amendment of the constitution of the United States is that "No *State* shall deprive any person * * *" and that it must appear in the bill that the acts of defendants were acts of the state by allegations showing the authority of the City Council to pass the ordinance, and that such ordinance was passed in pursuance of this state authority. This

court, being bound to take judicial notice of the general laws of the state (Owings *v.* Hull, 9 Peters 625; Gormley *v.* Bunyan, 138 U. S. 625; Mills *v.* Green, 159 U. S. 657) will take notice of those sections of Chapter 24 of the Revised Statutes of Illinois defining the powers and duties of the city council in citing, which apparently gives power and authority to declare what shall be a nuisance, to abate the same, and to make regulations which may be necessary or expedient for the promotion of health or the suppression of disease. It is not necessary to allege in pleading either matters of which the court is bound judicially to take notice, or matters which the law presumes. (Story's Equity Pleading (10th Ed.), Sec. 24),
31 and the court having taken notice of the general law of the state upon which such an ordinance as the one pleaded might properly have been based will presume that the ordinance pleaded *is* based upon this state authority. 21 Am. & Eng. Ency. of Law, p. 978, and cases cited. It would, therefore, appear that this point is not well taken.

From the view the court takes of the case, it becomes unnecessary to pass upon the other questions raised. This suit is brought against the City of Chicago and certain of its officers in their *official* capacity. It would seem very clear that the defendants cannot be held in this court for acts or threats which they have no power or authority from the state to perform, for if there is no ordinance under which they could, with any color of reason, claim to be acting, their acts are not the acts of the state, but mere private acts. While it is alleged that defendants acted and claimed to act under the provisions of Section 1161 of the Revised Municipal Code of the City of Chicago, it will be observed that under no possible construction of the ordinance could defendants claim the right of general stoppage of the entire business of complainant in storing admittedly wholesome articles of food, so that it would seem that these acts were those of mere trespassers, and plainly without the sanction of the state. As to these acts, therefore, the remedy must be in the state courts, there being no constitutional question involved necessary to give the court jurisdiction.

Having eliminated those acts which appear from the bill to be private trespasses, there remains (1) a seizure and threatened
32 condemnation and destruction of forty-seven barrels of poultry, and (2) threats to enforce the ordinance in question in the future. While it is difficult to see how a destruction of the barrels of poultry in question could be an irreparable injury such as is necessary to give a court of equity jurisdiction to interfere by injunction, (High on Injunctions (3rd Ed.) Section 1244, Cicero Lumber Co. *v.* Town of Cicero, 176 Ills. 9) it may well be that future acts of a similar nature to that complained of might injure complainant's reputation and good will in such a way as to properly be called irreparable, so that it becomes necessary to pass upon the question of the constitutionality of the ordinance in question. The allegation that this ordinance contravenes the Fourteenth Amendment to the Constitution of the United States cannot be sustained. The Fourteenth Amendment does not impair the police power of the states,

This was a power not surrendered by the states to the federal government, and is an inherent right of every sovereignty. Barbier *v.* Connolly, 113 U. S. 27, Mugler *v.* Kansas, 123 U. S. 623. In Booth *v.* People, 186 Ills. 43, the police power is defined as: "the general power of the government to protect and promote the public welfare even at the expense of private rights." It is clearly within the police power to protect the lives and health of the people by the seizure, condemnation and destruction of impure and dangerous articles of food. To require a regular judicial hearing, with full opportunity for the owner of the goods to be heard, would often defeat the purposes of the law by tying the hands of the officers entrusted with the duty of guarding the public against the sale of unwholesome food, and would be a serious menace to the lives and health of the people. Deems *v.* Baltimore, 80 Md. 164, 30 Atl. Rep. 648, and cases
33 cited; 25 Am. & Eng. Ency. of L. p. 146; McQuillin, Municipal Ordinances, Sec. 431, and authorities cited. The summary seizure and destruction of property without notice to the owner or judicial hearing has been upheld as a legitimate exercise of the police power by the United States Supreme Court in the case of Lawton *vs.* Steele, 152 U. S. 133, where the constitutionality of an act of the New York legislature providing for the summary seizure and destruction of nets used in illegal fishing was in question, and the reasoning of the court in that case applies with even more force in the case at bar, for the nets were not inherently dangerous to the public, while in the case of infected food great injury may be done by delay. The court in this case (Lawton *vs.* Steele, *supra*, after stating that there could be no doubt as to the power of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law, and giving many instances of this assumption of power by Congress, says:

"In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. Newark Railway *v.* Hunt, 50 N. J. Law, 308; Blasier *v.* Miller, 10 Hun, 435; House's Case, 12 Rep. 63; Stone *v.* New York, 25 Wend. 137, 173 Am. Print Works *v.* Lawrence 21 N. J. Law, 248; 23 N. J. 590. See also Blair *v.* Forehand, 100 Mass.
34 136, 139, 140, and cases cited. This decision was followed in the case of Leach *v.* Elwood, *et al.*, 3 Ills. App. 453.

If this rule should be held to apply to a case like the present one, it will be borne in mind that the ordinance calls for the seizure and

destruction of only "putrid, decayed, poisoned and infected food," which is without commercial value as food. The court (in Lawton *v.* Steele, *supra,*) goes on further to say:

" * * * the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard."

As above stated, the ordinance by its terms in no sense contravenes the provisions of the Fourteenth Amendment. Manifestly any abuse of the power granted by it would present no federal question. "Nor," as stated in Lawton *vs.* Steele, *supra,*—

"is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value."

It is true that in the dissenting opinion in this case Mr. Chief Justice Fuller (with whom concurred Mr. Justice Field and Mr. Justice Brewer) were unwilling to concede the power of summary abatement by seizure and destruction, but the ground of their dissent was that the nets were property entitled to the protection of the law, and at the time of their seizure were not employed for any improper purpose, and that "as the illegal use of the nets would be terminated by their withdrawal from the water there was a lack of necessity for the arbitrary proceeding prescribed."

The demurrer is, therefore, sustained, and the bill dismissed for want of jurisdiction.

(Endorsed:) Filed January 31, 1907, Marshall E. Sampsell, Clerk.

35 And on to wit: the thirty-first day of January, 1907, being one of the days of the regular December term of said Court, 1906, in the record of proceedings thereof in said entitled cause before the Hon. Charistian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Decree of Dismissal of January 31, 1907.

28416.

NORTH AMERICAN COLD STORAGE COMPANY
vs.
CITY OF CHICAGO, CHARLES J. WHALEN, EDWARD R. PRITCHARD, PATRICK J. MURRAY, THOMAS KELLY, JOHN R. BATCH, JAMES D. DOUGHERTY, P. H. DAWSON, ALBERT PUGNER, GEORGE MURPHY, CHRISTOPHER FOLEY, MICHAEL HANRAHAN, JOHN CASEY, JAMES DUNNE, FRANK WALSH, EUGENE MCWILLIAMS, JOHN WEISE and WILLIAM MAHONEY.

Now again comes the parties by their solicitors and the Court, having considered and being now fully advised in the premises finds that the Court has no jurisdiction in the premises; and thereupon,

It is ordered and adjudged that this cause be, and the same is hereby dismissed for want of jurisdiction; and that the complainant pay the costs herein.

36 And on to-wit: the ninth day of February, 1907, there was filed in the clerk's office of said Court in said entitled cause a certain Certificate in words and figures following to-wit:

37 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Gen. No. 28416.

NORTH AMERICAN COLD STORAGE COMPANY, Complainant,
vs.
CITY OF CHICAGO and CHARLES J. WHALEN ET AL., Defendants.

Certificate.

In this cause I hereby certify that the order of dismissal herein made is based solely upon the ground that no federal question was involved, and that the bill and amendment thereto in my opinion discloses the infraction of no right arising under or out of the federal laws and constitution, and that, treating the demurrer as presenting the question of jurisdiction, and acting also independently of the demurrer and on the Court's own motion, the suit is dismissed only for the reason above stated; that is, that the controversy, not arising under the laws and constitution of the United States, there is consequently no jurisdiction of the Circuit Court of the United States.

This certificate is made conformably to Act of Congress of March 3, 1891, Chapter 517, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceeding together with this certificate.

CHRISTIAN C. KOHLSAAT,
Circuit Judge.

Dated this ninth day of February, A. D. 1907.

(Endorsed:) Filed Feb'y 9, 1907, Marshall E. Sampsell, Clerk.

38 And on to-wit: the ninth day of February, 1907, come complainant in said entitled cause by its solicitor and filed in the clerk's office of said Court its certain Petition for Appeal in words and figures following to-wit:

39 *Petition for Appeal.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 28416.

NORTH AMERICAN COLD STORAGE COMPANY, Plaintiff,
vs.
CITY OF CHICAGO ET AL., Defendants.

The above named plaintiff, feeling itself aggrieved by the decree made and entered on the 31st day of January, 1907, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which such order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 9th day of February, A. D. 1907.

L. A. STEBBINS,
Attorney for Plaintiff.

The foregoing claim of appeal is allowed, this 9th day of February, A. D. 1907.

KOHLSAAT,
Circuit Judge.

(Endorsed:) Filed Feb., 9, 1907, Marshall E. Sampsell, Clerk.

40 And on to-wit: the ninth day of February, 1907, come the complainant in said entitled cause by its solicitors and filed in the clerk's office of said Court its certain assignment of errors in words and figures following to-wit:

41 *Assignment of Errors.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 28416.

NORTH AMERICAN COLD STORAGE COMPANY, Plaintiff,
vs.
CITY OF CHICAGO ET AL., Defendants.

Plaintiff prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns as errors:

1. The court erred in sustaining the demurrer to the bill and amendment thereto and dismissing the bill.

2. The court erred in holding that it had no jurisdiction of the cause.

3. The court erred in holding that Section 1161 of the Revised Municipal Code of the City of Chicago, 1905, is not in conflict with the fourteenth amendment to the Constitution of the United States.

The plaintiff prays that the order sustaining the demurrer to its bill and amendment thereto and dismissing said cause be reversed.

L. A. STEBBINS,
Attorney for Plaintiff.

(Endorsed:) Filed Feb. 9, 1907, Marshall E. Sampsell, Clerk.

42 And on the same day to-wit: the ninth day of February, 1907, being one of the days of the regular December term of said Court, 1906, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Order of February 9, 1907, Allowing Appeal.

28416.

NORTH AMERICAN COLD STORAGE COMPANY
vs.
CITY OF CHICAGO, CHARLES J. WHALEN, as Commissioner of Health of the City of Chicago, *et al.*

Now on this day come the parties by their solicitors, and the complainant presents its petition for an appeal to the Supreme Court of the United States, together with its assignment of errors and bond on appeal.

Thereupon it is Ordered that said appeal be and the same is hereby allowed to have reviewed in the Supreme Court of the United States the decree entered herein on the thirty-first day of January, 1907, dismissing the bill of complaint for want of jurisdiction and that a citation issue returnable to said Supreme Court of the United States within thirty days from this date.

43 And on the same day to-wit: the ninth day of February, 1907, there was filed in the clerk's office of said Court in said entitled cause a certain Bond on Appeal in words and figures following to-wit:

44 *Bond on Appeal.*

Know all men by these presents, that we, North American Cold Storage Company, an Illinois corporation, as principal, and A. M. Johnson, and C. B. Shedd, as sureties, are held and firmly bound unto the City of Chicago and Charles J. Whalen, in the full and just sum of one thousand Dollars, to be paid to the said City of Chicago and Charles J. Whalen, their executors, administrators or assigns,

to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this Ninth day of February, A. D. 1907.

Whereas, lately, at a Circuit Court holden in the City of Chicago, on the 31st day of January, 1907, in a suit pending in said court, wherein North American Cold Storage Company was plaintiff and the said City of Chicago, Charles J. Whalen, *et al.*, were defendants, a decree was rendered against the said North American Cold Storage Company, and the said North American Cold Storage Company having obtained an appeal and filed a copy thereof in the Clerk's office of said Court, to reverse the decree in the aforesaid suit, and a citation directed to the said City of Chicago and Charles J. Whalen, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden in the City of Washington, in thirty days from the date hereof.

Now the condition of this obligation is such that if the said North American Cold Storage Company shall prosecute said appeal to an effect and answer all damages and costs, and if it fail to make its plea good, then the above obligation to be void: else to remain
45 in full force and effect.

NORTH AMERICAN COLD STORAGE COMPANY,
By C. M. JOHNSON, [SEAL.]
President, Principal.

Attest:
ROBERT D. LAY,
[SEAL.] *Sec'y.*

A. M. JOHNSON, [SEAL.]
C. B. SHEDD, [SEAL.]
Sureties.

Approved: Feb'y 9, 1907.

KOHLSAAT,
Circuit Judge.

(Endorsed:) Filed Feb. 9, 1907. Marshall E. Sampsell, Clerk.

46 NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, *ss:*

I, Marshall E. Sampsell, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of all the proceedings had of record in said Court in the cause entitled North American Cold Storage Company *vs.* City of Chicago, *et al.*, General Number 28,416, as the same appear from the original records and files of said Court now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Chicago, in said District, this 15th day of February, 1907.

[Seal Circuit Court U. S. Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL, *Clerk.*

47 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Chicago and Charles J. Whalen, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, and filed in the Clerk's office of said court on the 9th day of February 1907, in a cause wherein North American Cold Storage Company, an Illinois corporation, is appel-ant, and you are appellees, to show cause, if any, why a decree rendered against said appellant, as in said appeal maintained, should not be corrected, and why speedy justice should not be done the parties in this behalf.

Witness the Honorable Christian Kohlsaat Judge of the Circuit Court of the United States for the Northern District of Illinois Eastern Division, 9th day of February, 1907.

KOHLSAAT,
Circuit Judge.

Service of a copy of the within citation is hereby admitted this 9th day of February, 1907.

JAS. HAMILTON LEWIS,
Attorney for the City of Chicago and
Charles J. Whalen, Appellees.

[Endorsed:] 28416. Citation. Circuit Court of the United States, Northern District of Illinois, Eastern Division. Filed Feb. 9 1907 Marshall E. Sampsell, Clerk.

Endorsed on cover: File No. 20,587. N. Illinois C. C. U. S. Term No. 622. North American Cold Storage Company, appellant, *vs.* The City of Chicago *et al.* Filed February 23d, 1907. File No. 20,587.

IN THE

Supreme Court of the United States

October Term, 1906.

NORTH AMERICAN COLD STORAGE COMPANY, *Appellant*,
vs.
CITY OF CHICAGO AND CHARLES J. WHALEN, *et al.* *Appellees.*

No. [redacted] 2[redacted]

MOTION TO ADVANCE UNDER RULE 32.

NORTH AMERICAN COLD
STORAGE COMPANY,
By L. A. STEBBINS AND W. H. SEARS,
Its Solicitors.

IN THE

Supreme Court of the United States

October Term, 1906.

North American Cold Storage Company,	*Appellant*,	No. 622.
vs.		
City of Chicago and Charles J. Whalen, *et al.*	*Appellees.*	

MOTION TO ADVANCE UNDER RULE 32.

Comes now, North American Cold Storage Company, Appellant, by L. A. Stebbins and W. H. Sears, its Solicitors, and moves the Court to advance this cause and take the same up out of its order on the docket of this Court, and set the same down for hearing on some future day to be fixed by the Court, for the reason that this cause is, as appears from the record, including the certificate of the trial Court, one where the only question in issue is the question of the jurisdiction of the Court below.

Appellees waive notice of this motion and consent that the case be advanced as appears below.

NORTH AMERICAN COLD
STORAGE COMPANY,
By L. A. Stebbins and W. H. Sears,
Its Solicitors.

IN THE

SUPREME COURT OF THE UNITED STATES.

NORTH AMERICAN COLD STORAGE COMPANY, *Appellant,*

vs.

CITY OF CHICAGO AND CHARLES J. WHALEN, *et al.* *Appellees.*

WAIVER OF NOTICE & STIPULATION.

The City of Chicago and Charles J. Whalen, defendants, by James Hamilton Lewis, their solicitor, waive notice of any motion to advance this cause under Rule 32, and hereby consent that said cause may be advanced on the docket of the Supreme Court; provided that said cause shall not be advanced so as to limit the time within which to file briefs.

LEON HORNSTEIN,
JAS. HAMILTON LEWIS,
(*Of Counsel*)
Solicitors for City of Chicago,
and CHARLES J. WHALEN.

DEC 12 1907

28.

No. [redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

[redacted]

NORTH AMERICAN COLD STORAGE COMPANY,
Appellant,

vs.

CITY OF CHICAGO and CHARLES L. WHALEN et al.,
Appellees.

[redacted]

BRIEF OF APPELLANT.

[redacted]

W. H. SEARS,

[redacted]

IN THE

Supreme Court of the United States

No. 622.

NORTH AMERICAN COLD STORAGE COMPANY,
Appellant,

vs.

CITY OF CHICAGO and CHARLES J. WHALEN et al.,
Appellees.

Food Inspection—Summary Destruction without Notice or Hearing —Due Process of Law.

"Doth our law Judge any man before it hear him and know what he doeth?"—John vii, 51.

"Who hath adjudged of aught, one side unheard,
Just, though the judgment, were himself unjust."—Seneca.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

Section 1161 of the Revised Municipal Code of the City of Chicago, 1905, provides as follows:

> "Every person being the owner, lessee or occupant of any room, stall, freight house, cold storage house or other place, other than a private dwelling, where any meat, fish, poultry, game, vegetables, fruit, or other perishable article adapted or designed to be used for human food shall be stored or be kept, whether temporarily or otherwise, and every person having charge of, or being interested or engaged,

whether as principal or agent, in the care of, or in respect to the custody or sale of any such article of food supply, shall put, preserve and keep such article of food supply in a clean and wholesome condition and shall not allow the same, nor any part thereof, to become putrid, decayed, poisoned, infected, or in any other manner rendered or made unsafe or unwholesome for human food; and it shall be the duty of the meat and food inspectors and other duly authorized employes of the health department of the city to enter any and all such premises above specified at any time of any day, AND TO FORTHWITH SEIZE, CONDEMN AND DESTROY ANY SUCH PUTRID, DECAYED, POISONED AND INFECTED FOOD, WHICH ANY SUCH INSPECTOR MAY FIND IN AND UPON SAID PREMISES."

Appellant is a corporation duly organized and existing under the laws of the State of Illinois, and by its articles of incorporation is authorized to own, operate and conduct a warehouse and cold storage business, and being so authorized, it does in fact own at 109 North Canal street, in the City of Chicago, a warehouse and cold storage plant, sixteen stories high, and worth more than $500,000, and by means of such cold storage plant, it conducts a warehouse and cold storage business, and has conducted such business at such place for more than one year, last past. It has, at all times, complied with the laws of the State of Illinois, and the ordinances of the City of Chicago. Its business is of great volume and great value, and consists of receiving and storing food products and goods, as a bailee for hire. It receives in the conducting of its business on an average of $20,000 worth of goods per day, and returns to its customers $20,000 worth of goods per day, and has in storage about $2,000,000 worth of goods.

It thus appears, that the appellant and its business are within the terms of the ordinance above quoted.

This action was brought in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, by the appellant against the City of Chicago, the Commissioner of Health of the City of Chicago, and others, to enjoin the enforcement of this ordinance upon the ground that the same is in conflict with that portion of the 14th Amendment to the Constitution of the United States, which provides that "no state shall make or enforce any law which shall * * * deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The defendants demurred to the bill (Rec., pp. 10-12), and the court sustained the demurrer on the ground that it had "no jurisdiction in the premises" (Rec., pp. 13-17), and thereupon the court dismissed the bill "for want of jurisdiction." (Rec., pp. 17 and 18.) It appears from the opinion of the trial court (Rec., p. 13), that the holding, that there was no jurisdiction, was based upon the ground that the ordinance in question was not in conflict with that portion of the 14th Amendment above quoted.

From this order dismissing the bill "for want of jurisdiction" the appellant prayed and obtained an appeal direct to this court (Rec., pp. 19-20), under the provisions of Paragraph 1 of Sec. 5 of the Judiciary Act of March 3, 1891 (4 Fed. Stat. Ann., 398), and the question of jurisdiction thus raised is certified to this court, as therein provided. (Rec., p. 18.)

The bill as originally filed had special reference to

forty-seven certain barrels of poultry, sought to be summarily destroyed by the city, and the destruction of which the appellant sought to enjoin.

With regard to this poultry, the bill alleges:

> "Your orator further complaining says that it has and for some time last past has had forty-seven barrels of poultry in cold storage in its said plant, received in due course of business from one F. A. Becker, a wholesale produce merchant of the said City of Chicago, doing business under the firm name and style of F. A. Becker & Company.
>
> "Your orator further complaining says that it is informed and believes, and therefore charges the fact to be, that said poultry is in a clean and wholesome condition, and that the same has not become putrid, decayed, poisoned or infected, or in any manner rendered or made unsafe or unwholesome for human food.
>
> "Your orator further complaining says that said poultry is now and ever since it has been in said plant has been in cold storage at so low a temperature that it would be impossible for it to, and it has not, changed its condition since it was received for storage; that it is not now being offered for sale; that it was not about to be taken out of your orator's plant when demanded by the defendants, and that at the temperature at which it was kept in cold storage by your orator the same would remain unchanged as to its condition for more than three months; that there was no occasion for any haste in the destruction of the same, if it were in any wise unfit for food, and that there is in all respects ample time for a thorough investigation and judicial determination of the question as to whether or not the same is fit for food. That the reasonable market value of the same is more than three thousand dollars ($3,000) and that your orator has agreed with the said F. A. Becker, doing business under the firm name and

style of F. A. Becker & Company, to keep said poultry and deliver the same to him, the said F. A. Becker, on demand, and to no other person, except upon his order." (Rec., pp. 3 and 4.)

It is further alleged that, on the 2nd day of October, 1906, about 4 o'clock in the afternoon (the day before this action was brought) certain representatives of the Health Department of the City of Chicago appeared at the appellant's warehouse, and demanded that appellant forthwith deliver to them the said forty-seven barrels of poultry, so as aforesaid, received for storage to be by them then and there forthwith destroyed, as being unfit for human food.

Whereupon the bill further alleges:

"Your orator further complaining says that immediately upon said demand your orator was notified by the said F. A. Becker that the said poultry was clean and wholesome, that he would hold your orator strictly accountable for the safe keeping thereof, and forbade your orator to deliver the same to the said defendants, or to any other person than him, the said F. A. Becker, or such person as he might designate.

"Your orator further complaining says that the said defendants demanded the said poultry for the purpose of destroying the same and were about to destroy the same.

"Your orator further complaining says that the said City of Chicago and each and all of its officers, servants, agents and employes aforesaid, made defendants herein, in demanding the said poultry, and in attempting to destroy the same, claimed to be acting and were acting under and in pursuance of the provisions of Section 1161 of the Revised Municipal Code of the City of Chicago, 1905. * * *

"Your orator further alleges that there is no other law or ordinance of the City of Chicago authorizing or purporting to authorize the said defendants or any of them to take such action, other than the said ordinance last above quoted.

"Your orator further complaining says that in fulfillment of its contractual duty as bailee aforesaid, and being advised by counsel and claiming and believing that said Section 1161 of the Revised Municipal Code of Chicago, 1905, in so far as the same attempts to authorize the said City of Chicago, its agents, servants and employes, to seize, condemn or destroy food or other products, is in conflict with that portion of the Fourteenth Amendment to the Constitution of the United States which provides that 'no state shall make or enforce any law which shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' it then and there declined to permit the said defendants to take or destroy the said poultry." (Rec., p. 5.)

It is then further alleged that the representatives of the City of Chicago took forcible possession of appellant's cold storage plant and prevented it from conducting its business.

As the ordinance in question, however, does not purport to authorize this action on the part of the City, and as the primary purpose of the action is to test the validity of this ordinance, stress is not here laid upon that portion of the bill which alleges the unlawful and forcible taking possession of appellant's business by the City.

A few days after the filing of the original bill, and before the filing of the demurrers, appellant amended its bill and broadened its scope, by alleging:

"Your orator further complaining says that the defendants, especially the said City of Chicago, Charles J. Whalen, Commissioner of Health of the Department of Health of the City of Chicago, Edward R. Pritchard, Secretary of the Department of Health of the City of Chicago, and Patrick J. Murray, as Chief Food Inspector of the Department of Health of the City of Chicago, claim the right under said Section 1161 of the Revised Municipal Code of the City of Chicago, 1905, to summarily destroy from time to time any and all products stored in the said warehouse and cold storage plant of your orator, which they or either of them may condemn as being putrid, decayed, poisoned or infected, or unfit for human food, without any judicial determination of the fact that such products are in such condition, and they, the said defendants, are now threatening to summarily destroy, from time to time, pursuant to the provisions of said Section 1161 of the Revised Municipal Code of Chicago, 1905, any and all food products which may be condemned by them or either of them, as being putrid, decayed, poisoned or infected, or unfit for human food, without any judicial determination of the fact that such products are in such condition." (Rec., p. 9.)

From the Amendment it appears that all of the products held by appellant in storage, of the value of two million dollars or more, are in jeopardy.

There is but one question in this case, and that question is, is Section 1161 of the Revised Municipal Code of the City of Chicago in conflict with the due process of law provision of the Fourteenth Amendment, in this, that it does not provide for notice and an opportunity to be heard, before the destruction of the food products therein referred to. If there is no such conflict, the ordinance is valid for the purposes of federal jurisdiction; the bill states

no cause of action and was properly dismissed, as there is no claim of any such diversity of citizenship as would confer jurisdiction upon the Federal Court, and no such jurisdiction exists, except by reason of the claim, that such ordinance is in conflict with the Fourteenth Amendment.

SPECIFICATION OF ERRORS RELIED UPON.

(1) The court erred in sustaining a demurrer to the bill.

(2) The court erred in dismissing the bill for want of jurisdiction.

(3) The court erred in holding that Section 1161 of the Revised Municipal Code of the City of Chicago, 1905, is not in conflict with the Fourteenth Amendment to the Constitution.

THE ARGUMENT.

Preliminary Suggestions as to the Jurisdiction of This Court.

It may be that the trial court misconstrued the true definition of the word "jurisdiction" and therefore erred in dismissing the case for "want of jurisdiction," even assuming that the conclusion was correct, that there is no conflict between the ordinance in question and the Fourteenth Amendment. In short, it may be, that the court in place of dismissing the bill "for want of jurisdiction" should have said, in its final order, in effect:

> "the court has jurisdiction to decide the question whether or not the ordinance is in conflict with the Fourteenth Amendment, and having jurisdiction, the court decided that there is no such conflict."

If this court should be of the opinion that this is the correct view, then it is pertinent to point out that the case is still appealable direct to this court, under the 6th paragraph of Section 5 of the Judiciary Act of March 3, 1891 (4 Fed. Stat. Ann., 399). In this event the certificate of the trial court (Rec., page 18) becomes surplusage, but does no harm, and this court will consider the case upon its merits, by reason of the jurisdiction conferred upon it by the statute last above quoted.

Giles v. *Harris*, 189 U. S., 475; 47 L. Ed., 909, *912*.

THE MERITS.

It would seem superfluous to suggest that the question thus presented is one of great importance, indeed no more fundamental constitutional question, or one of greater gravity can well be conceived of, as affecting property rights generally.

That notice, and an opportunity to be heard, shall precede the taking of life, liberty or property, is an ideal, which is absolutely fundamental in every system of constitutional government.

As was well said, in an early English case:

> "The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defense. Adam (says God), where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also." *Rex* v. *Cambridge Univ.*, 1 Stra., 558, *565*.

Justice Story once said:

> "It is a rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned." *Bradstreet* v. *Neptune Ins. Co.*, 3 Summ. (U. S.), 600.

THEORY THAT THE POLICE POWER OF THE STATE IS NOT SUBJECT TO CONSTITUTIONAL LIMITATIONS.

The learned judge of the trial court in his opinion says:

> "The fourteenth amendment does not impair the police power of the states: this was a power not surrendered by the states to the federal gov-

> ernment: it is an inherent right of every sovereignty." (Rec., p. 16.)

If, by this is meant, that the police power of the several states is without constitutional limitation, the court was laboring under a fundamental misconception of the function of the Federal Constitution. If such is the meaning of the judge of the trial court, he would have the Fourteenth Amendment read thus:

> "No state shall make or enforce any law which shall * * * deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws, except that the states may make and may enforce, under the police power of the several states, laws which shall deprive persons of life, liberty or property without any process of law whatsoever, and may, under the police power, deny to persons within its jurisdiction of equal protection of the laws."

According to this theory, the Constitution of the United States is not in all respects the supreme law of the land. As to the vast domain of police powers of the states, that vast domain to which exact limitation cannot be fixed, but which certainly embraces the great majority of the statutes and ordinances of the several states, pertaining to the domestic regulation of property and property rights, the states are above the Constitution. This is, indeed, a new and novel, and a startling proposition; if such is the law, what are we to do with Sec. 2 of Article 6 of the Constitution, which provides:

> "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made

> under authority of the United States, shall be the supreme law of the land, and the judges in the several states shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

It is quite true, that the several states retain all powers not conferred upon the Federal Government, or prohibited to the states by the Constitution. The police power of the several states is no exception to this general rule. This rule is a necessary deduction from our federal system of government, but to place all doubt, if any, at rest, this idea was formulated and expressed in the Tenth Amendment, as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it, to the states, are reserved to the states, respectively, or to the people."

That the police power of the several states stands in no different relation to the Constitution than the other powers reserved to the several states; that it is in no wise above the Constitution, but must, at all times, be exercised within the limits of the Constitution, is forcibly illustrated by an examination of the cases cited by the learned judge of the trial court, in support of the paragraph in his opinion, above quoted.

Take by way of illustration the case of *Mugler* v. *Kansas,* 123 U. S., 623; 31 L. Ed., 205. In this case it was determined that the prohibition law of the State of Kansas was not in conflict with the Constitution of the United States. Whatever doubts may exist as to the precise limitation of the police power of the several states, certain it is that a prohibitory law is pre-eminently a police regulation, and there-

fore, what is said by this court in the *Mugler* case, with regard to the prohibitory law of the State of Kansas, is undoubtedly a discussion of the limitations of the police power of the states, from a constitutional standpoint. It is, indeed, said in this case, quoting with approval from the case of *Barbier* v. *Connolly,* 113 U. S., 31; 28 L. Ed., 924, that the Fourteenth Amendment was not

> "designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people."

But, it is nowhere intimated in this case that such police power may be exercised in any arbitrary manner inconsistent with the fundamental principles of natural right, and against the expressed prohibition of the Constitution. Indeed, the reverse of this proposition, it is affirmed with emphasis. Thus we read:

> "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the states. There are necessary limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the Constitution, rather than the lawmaking department of government, and must, upon their own responsibility, determine whether in any particular case these limits have been passed."
>
> *Mugler* v. *Kansas,* 123 U. S., 623; 31 L. Ed., 205, *210.*

Then again the court says:

> "Undoubtedly the state, when providing by legislation for the protection of the public health, the public morals or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by the instrument, or interfere with the execution of the powers confided to the general government."
>
> *Mugler* v. *Kansas,* 123 U. S., 623; 31 L. Ed., 205, *211.*

Again the court says, in speaking of the arraignment of the Kansas prohibitory law as being an arbitrary spoliation of property without due process of law, that:

> "This certainly is a formidable arraignment of the legislation of Kansas, and if it were founded upon a just interpretation of her statutes, the court would have no difficulty in declaring that they could not be enforced without infringing the constitutional rights of the citizen. But these statutes have no such scope, and are attended with no such results as the defendants suppose."
>
> *Mugler* v. *Kansas,* 123 U. S., 623; 31 L. Ed., *205, 214.*

Can one conceive of this court as saying in reply to an arraignment of any ordinance or statute, as depriving one of property, without due process of law:

"This is certainly a formidable arraignment of the legislation in question, but the police power of the several states is above the Constitution? The Constitution was not designed to prohibit the several states from taking property without due process of

law, provided such taking is accomplished by means of the police power."

The case of *Booth* v. *People*, 186 Ill., 43, cited by the learned judge of the trial court, does not tend to show that the police power is above the Constitution, but it is an authority in support of the proposition that such power can only be exercised within the limits of the Constitution. In this case, it was said:

> "First—Liberty and property, as used in said constitutional provisions, include the right to acquire property, and that means and includes the privilege of contracting and making and enforcing contracts. (*Frorer* v. *People*, 141 Ill., 171.) *A citizen cannot be deprived of an attribute of property, like the right to make a reasonable contract with reference to property, without 'due process of law.'* Due process of law is a general public law of the land. (*Millett* v. *People*, 117 Ill., 294; *Ritchie* v. *People*, 155 *id.*, 98.) The General Assembly of the State of Illinois possesses full plenary power of legislation, *except in so far as its powers are limited by the State or Federal Constitution.* The state inherently possesses, and the General Assembly may lawfully exercise, such power of restraint upon private rights as may be found to be necessary and appropriate to promote the health, comfort, safety and welfare of society."
>
> *Booth* v. *People*, 186 Ill., 43, *48*.

In a very recent work on Due Process of Law by Prof. McGehee, of the University of North Carolina, it is said:

> "It has been repeatedly declared by the Supreme Court of the United States that the limitations on state action contained in the Fourteenth Amendment were not designed to limit or interfere with the exercise of the police power

on the part of the states. This declaration only means that the sphere of the legitimate power is the same under the amendment as without it. *What is the legitimate sphere of the police power is under that amendment a question for the final determination of the Federal Supreme Court, and to be tested by the body of doctrines which have grown up in its decisions, in the interpretation of the National Constitution.*"

McGehee on Due Process of Law, 305.

A few extracts from recent opinions of this court on this question will suffice to close the discussion on this point. In *Central of Georgia R. R. Co.* v. *Murphy,* 196 U. S., 194; 49 L. Ed., 444, *449*, this court, speaking through his honor, Justice Peckham, says:

"The police power of the state does not give it a right to violate any provision of the Federal Constitution."

49 L. Ed., 449.

In *Reid* v. *Colorado,* 187 U. S., 137; 47 L. Ed., 108, this court speaks through his honor Justice Harlan, said:

"The acknowledged police powers of a state cannot legitimately be exerted so as to defeat or impair a right secured by the National Constitution, any more than to defeat and impair a statute passed by Congress, in pursuance of the powers granted to it."

47 L. Ed., 115.

In *Lake Shore and Michigan Southern Ry. Co.* v. *Smith,* 173 U. S., 684; 43 L. Ed., 858, *861*, this court, speaking through his honor, Justice Peckham, says:

"This power (the police power) must, however, be exercised in subordination to the provisions of the Federal Constitution, if in the assumed exercise of its police power, the legislat-

ure of a state directly and plainly violates a provision of the Constitution of the United States, such legislation would be void."

43 L. Ed., 861.

In the very recent case of *Dobbins* v. *Los Angeles*, 195 U. S., 223; 49 L. Ed., 169, his honor Justice Day, speaking for the court, and quoting with approval from his honor Justice Harlan, in a prior case, said:

"The question of constitutional law to which we have referred (the equal protection of the laws) cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But, as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power by appropriate legislation to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

49 L. Ed., 175.

DOES SEC. 1161 OF THE REVISED MUNICIPAL CODE OF THE CITY OF CHICAGO DENY DUE PROCESS OF LAW?

Having ascertained that the police power of the several states can only be exercised within the limits of the Constitution, and that the prohibition upon the states embodied in the Fourteenth Amendment, are equally applicable to the police power of the states; in short, having ascertained that the states cannot deprive one of life, liberty or property without due process of law, it remains only to enquire: Does the ordinance in question deny due process of law? Does it provide for a summary seizure and destruction of property without due process of law?

That it is within the general scope of the police power of the several states to make such rules and regulations as will promote the health of its citizens, and to that end to provide for the inspection of food products, and upon proper notice and hearing, to prevent the sale or use of decayed, poisoned or infected food, is of course beyond question. Regulations of this kind when framed within the limits of the Constitution and when not designed to be exercised in an arbitrary or oppressive manner, are of course to be highly commended.

With the daily increasing complexity of our social organism, the exercise of this part of the police power of the several states is of increasing importance, but its importance but emphasizes the necessity of its being used, according to those principles of enlightened justice which are embodied in the Constitution.

That portion of the ordinance which provides that persons keeping food products in cold storage should

"put, preserve and keep such articles of food

> supply in a clean and wholesome condition, and shall not allow the same, or any part thereof, to become putrid, decayed, poisoned, infected, or in any other manner rendered or made unsafe or unwholesome for human food,"

is of course highly proper and in no wise infringes any constitutional right. It is also proper to make it the duty of the representatives of the Health Department "to enter any and all such premises above specified, at any time of any day," for the purposes of inspection and for any and all other purposes which will not amount to an arbitrary spoliation or destruction of property, without due process of law, but when the ordinance goes further, and attempts to authorize the Health Department "to forthwith seize, condemn and destroy any such infected food, which any such inspector may find in and upon said premises," without any provisions whatever for notice to the owner of the property, or the bailee holding the same in cold storage, and without any opportunity whatsoever for any hearing, of any kind or character, before any person or official, on the question: is the food proposed to be seized and destroyed in fact putrid, decayed, poisoned, or infected, the ordinance clearly passes the constitutional limitation of due process of law; it attempts to substitute for due process of law the arbitrary fiat of an executive officer. If this ordinance is valid in the respect above indicated, the boasted beneficent limitations of the Constitution are indeed a delusion and a snare, and we are suddenly to awake from a dream of fancied security for property and property rights guaranteed under the Constitution, and find, that instead of living under a con-

stitutional form of government, where no man is possessed of arbitrary power, we have instead a government where, as to the vast domain of the police power of the states, any petty executive officer may be made a Czar, to take life, liberty or property without any process of law whatsoever, and because of his arbitrary determination that some offense has been committed, and that such life, liberty and property shall, in consequence thereof, be taken.

The writer experiences some difficulty in attempting to marshal and present in logical order, the reasons why this ordinance in the respect indicated does not provide for due process of law. Not because of any lack for such reasons, but because it is so perfectly obvious; it is so self evidently indisputable, that there is no due process of law here provided for, that one experiences difficulty in attempting to state at length that which is so perfectly obvious.

How shall we prove that this ordinance does not provide for the ascertainment of the fact that the food to be destroyed is putrid, decayed, poisoned or infected, by due process of law, when there is no process of law of any kind or character, or any pretense of any process of law, which is "due" or otherwise?

If this ordinance is valid, representatives of the Health Department of the City of Chicago may, at any moment, appear at the cold storage plant of the appellants, may demand instant admission, and may instantly, upon being admitted to the plant, condemn every dollar's worth of the food products therein contained, which, under the demurrers, is admitted to be of the value of $2,000,000, and may instantly seize and utterly destroy every dollar's worth of said

property. No notice of any kind or character, no opportunity to be heard before any body on any question of fact whatsoever.

This, and other courts, have wisely refrained from undertaking to set down the exact limits of the phrase, "due process of law," but have preferred to allow each case to be decided upon its merits. Hard and fast definitions are dangerous, but, whatever doubt may exist, as to the exact limits of due process of law, two things are always, everywhere, universally recognized as being absolutely indispensable to due process of law: (1) notice; (2) an opportunity to be heard. Much learning has been expended on the question; how much notice is required in particular cases to comply with the requirement of due process of law; but no court has ever said that where due process of law is required that it can exist without notice.

Much learning has been expended on the question; must the hearing incident to due process of law be before a judicial tribunal? Is one entitled to a jury trial? But no court has ever said that due process of law can exist without some hearing, before some body, at some time, where questions of fact are to be determined. It is not incumbent upon us to say how much notice is necessary, nor how summary the hearing may be, or before whom it may be held. These questions must first be determined by the law-making body, and it is then for the courts to say whether such determination is within the limitation of the Constitution. It is only necessary for the purposes of this discussion to affirm that *some* notice and *some* hearing are essential to due process of law, as none whatever is provided for in this ordinance.

A Few Definitions of Due Process of Law.

Due process of law, as found in the 14th Amendment, is expressive of the same idea as was expressed by the phrase "law of the land," in the 39th Chapter of the Great Charter of King John.

McGehee on Due Process of Law, pp. 3 and 4.

The definition of the law of the land, or due process of law, most often quoted in the books, is that given by Webster, in his argument in the *Dartmouth College* case:

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts of reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under."
>
> *Dartmouth College* v. *Woodward*, 4 Wheat. (U. S.), 518.

In *Pennoyer* v. *Neff* the Supreme Court of the United States thus defines due process of law:

"A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights —to give such proceedings any vitality there must be a tribunal competent by its constitution, that is, by the law of its creation—to pass upon the subject matter of the suit."

Pennoyer v. *Neff*, 95 U. S., 714; 24 L. Ed., 565, *572*.

In Prof. McGehee's work on Due Process of Law it is said:

"Among matters held fundamental and essential is the presence of notice and hearing which is of the very essence of due process."

McGehee on Due Process of Law, p. 58.

Again, in the same work, it is said:

"Justice requires that a hearing and an opportunity to present defenses must precede condemnation. Around this ideal of justice has grown up the constitutional conception of 'the law of the land' or due process of law,' but the ideal was not confined to one system of jurisprudence, and was common to thoughtful men everywhere."

McGehee on Due Process of Law, p. 73.

In *Galpin* v. *Page* the Supreme Court of the United States said:

"It is a rule as old as the law and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been offered an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of judicial determination. It is judicial usurpa-

tion and oppression and never can be upheld where justice is justly administered."

Galpin v. *Page,* 18 Wall., 350; 21 L. Ed., 959, *963.*

A Few Cases in Point from the State Courts Worthy of Consideration.

The Supreme Court of Maine, speaking with reference to a statute authorizing the killing of horses by police officers, acting for The Society for the Prevention of Cruelty to Animals, says:

"This is an action of trespass for killing the plaintiff's horse. The defendant justified as an agent of the Society for the Prevention of Cruelty to Animals, he first having strictly followed the provisions of Rev. St., C. 124, Sec. 42. The appraisers adjudged the horse to be of no value, and so testified before the jury in this action, but the jury fixed the value at $30. We are of opinion that so much of the provisions of Rev. St., C. 124, Sec. 42, as allowed the defendant to condemn, conclusively fix the value of, and destroy the defendant's horse, without any notice, actual or constructive, to the owner, in order that he might be heard, is in violation of the fundamental law, which prohibits any person from being deprived of his property without due process of law. (*Dunn* v. *Burleigh,* 62 Me., 24.) Such have been the adjudications even in the regard to the destruction of intoxicating liquors intended for unlawful sale. (*Fisher* v. *McGirr,* 1 Gray, 1; *Lincoln* v. *Gray,* 27 Vt., 355.) Our own statute contains provisions for notice before destruction of such liquors. (Rev. St., C. 27, Sec. 41.) Same has been held in relation to gambling implements. (*Lowry* v. *Rainwater,* 70 Mo., 152; 35 Am. Rep., 420.) See cases in note 48 Am. Dec., 272, *et seq.* Exceptions sustained."

King v. *Hayes,* 80 Me., 206; 13 Atl., 882, *883.*

The statute of Ohio prohibited the use of fish nets and seines under certain conditions and provided that:

> "Any nets, seines, pound nets, or other devices for the catching of fish, set, placed, located or maintained in violation of the provisions of this section, shall be confiscated wherever found, and the same shall be sold to the highest bidder at public outcry at a place to be selected by the Fish Commissioners, and the proceeds derived from such sale shall be placed to the credit of the fish and game fund, and subject to the warrant of such commissioners."

The Supreme Court of Ohio held this statute unconstitutional, saying:

> "While the seizure may be made in the first instance by an officer of the law, doing no unnecessary damage, the confiscation must be made by the judgment of a court having jurisdiction of the subject matter. This section gives the right of confiscation, but fails to provide a legal proceeding by which the confiscation may be adjudged; and there being no other statute providing a proceeding in such cases, it attempts to take and sell private property and place the proceeds in the public treasury, without any process of law. The section is, therefore, in conflict with Article 1, Sec. 16, of our Constitution, which provides as follows: All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have the remedy by due course of law; and justice administered without denial or delay. To confiscate is to seize and appropriate to the use of the state. It is also defined as follows: To appropriate private property as forfeited to the public use or treasury, especially because of the wrong doing of the owner. In this sense, it is in the nature of a fine imposed upon an offender, which cannot be done without due proc-

ess of law. It is, in legal effect, taking private property for the use of the public without compensation and without process of law. The confiscation act of Congress passed July 17, 1862 (12 Stat., 589), provides for proper proceedings in court of competent jurisdiction to adjudge and order the confiscation and sale of the property seized. So, in confiscations for violations of the revenue laws there is a provision for legal proceedings. Proper legal proceedings are always necessary to adjudge a forfeiture or confiscation, and to permit officers or private persons to seize, sell or appropriate private property without legal proceedings, under a claim of confiscation, would be inconsistent with the principles of constitutional government, and would soon lead to fraud, corruption, oppression and extortion. Such statutes to be constitutional, should not only provide the right of confiscation, but should also provide the remedy, and then such remedy would be exclusive. (*Commissioners of Hancock Co.* v. *First Nat. Bank of Findley*, 32 Ohio St., 194.) The act being unconstitutional, it can afford no protection to the Fish Commissioner, and owner of the tug for seizing and taking away the nets. They were wrongdoers from the beginning, the same as if the act had never been passed, and they were liable to the owners of the nets for their value, and the judgment against them is right. Judgment affirmed."

Edson v. *Crangle*, 62 Ohio St., 49; 56 N. E., 647, *648*.

An ordinance of the Town of Lagrange in Kentucky provided as follows:

"That it shall be unlawful for hogs to run at large on the streets of said town between the first day of April and the first day of November of each year. Any persons permitting their hogs to run at large shall be subject to a fine of one dollar for each and every offense for each

hog and pig. It shall be the duty of the town marshal, upon being notified or knowing of hogs being on the streets, to put them in a lot and advertise them for three days and to offer them at public sale to the highest bidder for cash, and after paying the expense thereof, to pay over to the rightful owner the balance, if any. Further, the owner of all such hogs or pigs as may be impounded by the marshal shall be responsible for all expenses he may have incurred, and for the simple duty of impounding a hog he shall be allowed fifty cents."

It was held unconstitutional as denying to owners of hogs due process of law, in a well considered opinion, the court concluded the discussion as follows:

"The power of the legislature, under the Constitution, to confer upon municipalities, for police and sanitary purposes, the right to control the use of the property of the citizen in such a way as may be conducive to the public good, and even to enforce a forfeiture by judicial proceedings, when it becomes necessary, is not denied. It is insisted, however, that the right to forfeit without citation and without hearing can only exist from necessity. That right in this instance should not be extended beyond impounding the hogs. When that is done the necessity for summary and precipitate action ceases, and judicial proceedings looking to forfeiture may then properly begin. If the ordinance has been violated, appellant may be compelled to pay the fees for impounding and keeping the hogs, but their payment cannot be enforced by forfeiture without judicial determination."

Varden v. *Mount*, 78 Ky., 86; 39 Am. Rep., 208, *212.*

Section 636 of the Penal Code of California prohibited the use of seines and nets for the purpose of fishing, under certain conditions, and provided:

> "That all nets, seines, fishing tackle, boats or other implements used in catching or taking fish in violation of the provisions of this chapter shall be forfeited, and may be seized by the peace officer of the county, or his assistant, and may be by him destroyed or sold at public auction upon notice posted in the county for five days."

This statute was held unconstitutional by the Supreme Court of California, for denying due process of law, the court saying:

> "It follows that so much of the statute under consideration as authorized defendant to arbitrarily seize and destroy or sell the property of the plaintiff for alleged forfeiture, without judicial proceedings for its condemnation, or monition or notice, actual or constructive, to its owner of the charges for which the forfeiture was claimed, and of the time and place for determining them, was unconstitutional and void, and offered no protection to the defendant for the detention of the property in question."
>
> *Ieck* v. *Anderson,* 57 Cal., 251; 40 Am. Rep., 115, *117.*

Certain provisions of the general statutes of Missouri and of a statute creating a board of police commissioners of the City of St. Louis, provides as follows:

> "Whenever the acting president of said board (in the general statutes any judge or justice of the peace) shall have knowledge or shall receive satisfactory information that there is any prohibited gaming table, or other gaming device, kept or used in the City of St. Louis, he

shall have power to issue, and it shall be his duty forthwith to issue a warrant directed to some officer of the police force under said board (in the general statutes 'to the sheriff or any constable') to seize and bring before him such gaming table or other gaming device.

"Section 6. The officer charged with the execution of the warrant shall have power, if necessary, to break open doors for the purpose of executing the same, and for that purpose may have the assistance of the whole police force.

"Section 7. It shall be the duty of such acting president (in the general law 'of the judge or justice of the peace') before whom any such prohibited gaming table or device shall be brought, to cause the same to be publicly destroyed by burning or otherwise."

These statutes were held unconstitutional, as denying due process of law, the court saying:

"Hence, a statute which authorizes a seizure of private property under a warrant issued in pursuance of provisions such as are contained in section seven, should also afford a speedy trial to ascertain whether the property is of the character and is used or held for purposes condemned by the act, and making provision for duly notifying the owner and giving him a day in court. The constitutional safeguards thrown around the rights of property are not to be demolished in order to suppress gambling or gambling houses. The vices which acts authorizing these summary proceedings propose to eradicate are inconsiderable in comparison with the value of the constitutional guarantees which secure to the citizen his liberty and property. We recognize the right of the state to adopt, and the propriety of a rigorous enforcement of, laws for the suppression of gambling and gambling houses, but these laws may be so framed as to harmonize with those constitutional provisions,

and hasty and inconsiderate legislation which disregards them cannot be upheld."

Lowry v. *Rainwater*, 70 Mo., 152; 35 Am. Rep., 420, *424*.

In the case of *Munn, Health Commissioner of the City of Denver*, v. *Corbin*, 8 Col. App., 113; 44 Pac. Rep., 783, the action of the health commissioners of the City of Denver in condemning certain ice was drawn in question by a bill for an injunction; certain ordinances of that city authorized the health commissioners to abate nuisances, dangerous to the public health, and provided a notice and an opportunity to be heard before the commissioner himself. In this particular case, however, no notice nor opportunity to be heard was given the owner of the ice. Concerning the action of the health commissioner the court says:

"If we concede that the health commissioner was invested with power to condemn and destroy the ice of the appellees upon finding that the health of the community was endangered by its sale and use, we find nothing in the return to authorize the exercise of the power. It shows no such apparently imminent danger as to make the destruction of the property a matter of immediate necessity; and it shows no such investigation of the facts as law and justice ordinarily require before a judgment can be rendered depriving a person of his property. Circumstances may exist which seem to demand quick and summary action for the protection of health and life, and in such a case an officer upon whom authority for the purpose is conferred will not be held responsible for a sacrifice of property which the exigencies of the situation appear to require. But no decision which we have found goes further than this, and, where the necessity for immediate action does not exist, a judgment

condemning property must be the result of a trial before a regularly authorized tribunal, in a proceeding to which the person whose rights are to be affected is a party, and in which the burden of proving the charges is upon the complainant, and full opportunity is given to the adverse party to make his defense. * * *

"In justification of the commissioner's proceedings, reliance seems to be placed on Section 139 of the Ordinances, which authorized him to condemn or cause to be destroyed any fluid or substance intended for food or drink, whenever he was satisfied that its consumption might be dangerous to health; and we must say that, unless authority for the summary proceedings of the commissioner is found in that section, the ordinance does not contain it. But we cannot consent to a construction of the section which would empower a man, merely because he is distinguished from his fellow citizens by the title of health commissioner, to go about the city giving orders for the destruction of property, whenever by some mental operation of which he alone is cognizant, he has concluded that its use might be dangerous to health. He must become satisfied of the noxious character of the property in a legal way, by the application of legal methods, and as the result of an investigation conducted in accordance with the rules governing judicial proceedings of which due notice has been given to the owner of the property, and at which full opportunity is accorded him to resist the proposed action and make his own defense. In so far as the ordinance may empower the health commissioner summarily to make a final and conclusive order for the destruction of property, except under extraordinary conditions, it is invalid, and no justification to the officer for so proceeding. * * *

"The health commissioner is authorized upon certain conditions to cause nuisances to be abated, and noxious substances removed or destroyed. But there must be a determination in

> some way that a nuisance exists, or that the substance is noxious, before measures can be taken to abate or remove it. We cannot conceive that it was the intention of the legislature to commit the fate of property, regardless of surrounding conditions, to the arbitrary and irresponsible decision of one man, and so clothe him with an authority which might be used without limit for purposes of oppression. If the statute must be so construed it is in violation of rights guaranteed by the Constitution, and therefore void."

The absurdity and injustice of conferring upon some one, merely because, in the language of the court in the case last above quoted, that "he is distinguished from his fellow citizens by the title of health commissioner" with authority "to go about the city giving orders for the destruction of property whenever by some mental operation of which he alone is cognizant, he has concluded that its use might be dangerous to public health," is well illustrated by what has actually occurred with reference to the controversy over the poultry, which precipitated this suit. While the fact about to be stated is not in the bill, and therefore is not directly before the court, it may be properly stated by way of illustration, and the fact is, that about the same time this action was commenced, an action was also commenced by the owner of the poultry in question in the state court, to enjoin the City from destroying the same; the case was referred to a Master to take testimony and report, as to whether or not the poultry was wholesome. Voluminous testimony has been taken and at this writing (April, 1907) the issue of fact thus joined has not yet been determined, and the poultry still remains in the warehouse of com-

plainants where it was when the effort was made by the City to destroy it, and no one has or can possibly be injured by the poultry remaining in cold storage while the question of fact is being judicially determined.

44 Pac., 788.

In the case of *Weil* v. *Ricord*, 24 N. J. Eq., 169, the Board of Health of the City of Newark, N. J., pursuant to authority conferred upon it by the ordinance of the City of Newark, in the State of New Jersey, passed the following resolution:

> "Whereas, one Henry Weil is engaged in the business of receiving green hides and rough fat upon the premises now occupied by him on Norfolk street near South Orange avenue; and it appearing to the Board of Health that the said business, so carried on, is offensive and cause of great annoyance to the residents of the neighborhood, the Board of Health do esteem and declare the said business, upon the said premises, a nuisance, and do direct that the owner thereof be notified according to law, to abate the same, and that, upon failure to do so, the Board of Health will proceed to abate the same according to law."

Weil brought an injunction to restrain any interference with his business. In the course of a lengthy discussion, the court says:

> "There is another consideration in this case, worthy of notice. It is an essential principle of natural justice, that every man have an opportunity to be heard upon any question involving his rights or interests, before he is affected by the decision. The adjudication of the Board of Health in this case, even if its power to make it were admitted, could not be sustained, for it was made without notice to the complainant, or

any opportunity to be heard in his defense. The plaintiff cannot be deprived of the use of his property for the purposes of his business by force of an adjudication thus made.

"The Board of Health may proceed without notice, in case of public emergency, to abate a nuisance; but their adjudication going beyond this, to the extent of depriving a person of the use of his premises for the future, in his lawful business, would, if otherwise lawful, be invalid, if an opportunity had not been afforded to him to be heard before the making of the adjudication. * * *

"It would violate one of the fundamental principles of justice to deprive a party, absolutely, of the free use and enjoyment of his estate, under an allegation that the purpose to which it was appropriated or the mode of its occupation, was injurious to the health and comfort of others, and created a nuisance, without giving the owner an opportunity to appear and disprove the allegation, and protect his property from the restraint to which it was proposed to subject it."

24 N. J. Eq., p. 177.

A similar case arose in the Supreme Court of New Jersey, three years after the preceding case was decided (1876). The court reaffirmed the principles laid down, *Weil* v. *Ricord:*

"The ignorant, hasty and indiscreet conduct of this Board of Health is an admonition not to be disregarded against listening to any claim, that, under any circumstances, the power of ultimate judgment over the law and facts with respect to the rights of persons or property can be safely confided in other hands than those of the ordinary judicial tribunal."

Hutton v. *Camden,* 39 N. J. L., 122, *132.*

Who can read the bill in the case at bar, and contemplating the outrageously arbitrary conduct of the representatives of the Health Department of the City of Chicago therein recited, and not be driven to the conclusion that its hasty and indiscreet conduct is not, likewise, an admonition of the danger of listening to claims, that under any circumstances, the power of judgment over the law and the facts, at least with respect to such valuable property and property rights as are invested in cold storage plants and their contents, of the value of millions of dollars, cannot be safely confided to hands other than those of at least some sort of a judicial tribunal.

The condemnation and destruction of intoxicating liquors kept for sale in violation of the regulating or prohibitory statutes, is exactly analogous to the question here under discussion. By the multitude of statutes that have been enacted from time to time, in nearly every state in the Union, on this subject, it has rarely been attempted to authorize the destruction of intoxicating liquors, except upon due notice, and an opportunity to be heard by the owner thereof, before some judicial tribunal. An early Massachusetts statute, however, did attempt to raise a presumption that all liquors found by officers of the law, holding search warrants, were intended for use contrary to law, and to cast the burden of proof upon the owner to show that they were held for a lawful purpose. A process of law was herein provided for; this process was, however, held by the Supreme Court of Massachusetts to be insufficient to comply with the constitutional guaranties in the respects above indicated, and for other reasons.

The opinion of the Supreme Court of that state was delivered by that great jurist, Chief Justice Shaw. The whole opinion is worthy of more careful consideration. Without attempting to quote portions of this, the leading case in this country, on the subject of destruction of intoxicating liquors, the whole opinion is commended to the most careful consideration of the court, as tending in all respects to support the position contended for in the case at bar.

Fisher v. *McGirr*, 1 Gray (Mass.), 1; 61 Amer. Dec., 381.

NECESSITY FOR IMMEDIATE ACTION AS AN EXCEPTION.

That constitutional limitations in extreme cases yield to overwhelming necessity has, so far as the writer has been able to discover, never been directly affirmed by this court, as a rule of constitutional law, but that such exception exist in rare cases the writer has no doubt. Perhaps if this court were to formulate the reasons for such exceptions, they might read somewhat as follows:

> "The Constitution was ordained 'to promote the general welfare and to secure the blessings of liberty to ourselves and our posterity;' this being so, if in rare cases a rigid application of the literal terms of the Constitution would necessarily and inevitably imperil the general welfare and destroy the blessings of liberty to ourselves and our posterity, and if this is so clearly proven that all men instinctively recognize its truth as to a certain class of cases, then it must be presumed that the framers of the Constitution did not contemplate that such literal interpretation should be placed upon it, but that it should be given that more liberal interpretation which would promote the general purposes

of the Constitution rather than defeat such purposes."

Thus, all men are entitled to due process of law before they shall be deprived of their life, their liberty or their property, but, if a great conflagration is in progress, and the fire is sweeping down upon a certain section of a great city, and in order to stop its progress it is necessary to destroy buildings in its path, all men instinctively recognize that it is impossible to stop in such a moment of great peril to have a judicial determination of such necessity before their destruction. We all instinctively recognize that before such determination could be had the object to be attained by the destruction of the buildings would be lost.

Again, a domestic animal, entitled to protection as property under the Constitution, is afflicted with hydrophobia, is at large, and a menace to the community; we all recognize the immediate, imperative necessity for taking the life of such animal, without waiting for any judicial determination of such necessity.

Again, if infected, decayed or poisoned food be found exposed in the market place for sale, we would all recognize the imperative necessity of preventing such sale and of the seizure of such infected food, and conveying the same to some place of safety, but, even in such cases, there would be no necessity for destroying the same; the necessity would extend only to preventing its sale. In this, and many other cases that might be imagined, it may be freely conceded that a literal interpretation of the Constitution would yield to overwhelming necessity.

But it requires no extended argument to demonstrate that such exception, in order to prevail over the literal terms of the Constitution, should be made out, beyond any possibility of reasonable doubt. Every presumption is against the exception, every doubt is resolved in favor of a uniform application of the terms of the Constitution, under any and all circumstances.

Does any such necessity exist in this case? Turning to the allegations of the bill, we read:

> "Your orator further complaining says that said poultry is now and ever since it has been in said plant has been in cold storage at so low a temperature that it would be impossible for it to, and it has not, changed its condition since it was received for storage; that it is not being offered for sale; that it was not about to be taken out of your orator's plant when demanded by the defendants, and that at the temperature at which it was kept in cold storage by your orator the same would remain unchanged as to its condition for more than three months; that there was no occasion for any haste in the destruction of the same if it were in any wise unfit for food, and that there is in all respects ample time for a thorough investigation and judicial determination of the question as to whether or not the same is fit for food." (Rec., p. 3.)

Furthermore, the court will take judicial notice of those things which are of common knowledge and public history; the court knows judicially that cold storage houses, referred to in Section 1161 of the Revised Municipal Code of Chicago, are places where food products and other property is kept at a low temperature, not for sale, but for storage. Under these circumstances, there cannot be the slightest

necessity for the immediate destruction of such property; if infected food was about to be taken from a cold storage plant to be sold on the market there might be an immediate necessity to take such steps as might be necessary to prevent the property from being placed on the market, or offered for sale for consumption, but even in these cases, there would not be the slightest necessity for the immediate destruction of such property; the necessity would only extend to preventing a sale for consumption, pending a judicial determination of the fact, that the food was infected or decayed, and therefore should be destroyed.

Opinion of the Trial Court.

The first question sought to be raised by the demurrer to the bill was, that it did not appear from the bill that more than two thousand dollars was involved, exclusive of interest and cost; the learned trial court found this contention was not well taken, and the writer deems it sufficient for the purposes of this brief to refer to that portion of the opinion of the trial court, discussing this question, found on page fourteen of the record.

It was next contended by the City, upon the demurrer, that there was no showing in the bill, that the ordinance was passed pursuant to some statute of the State of Illinois; conceding for the sake of brevity and for the purposes of this discussion only, that a City ordinance to be in confliction with the Constitution, must be passed pursuant to some statute of the state, we find that the learned trial court, taking judicial notice of the statutes of the State of Illinois, found that the ordinance in question was

passed pursuant to statute. The writer, therefore, deems a further discussion of this qusetion unnecessary, but begs leave to refer to that portion of the opinion of the trial court, which discusses this question. (Rec., pp. 14 and 15.)

While this court, of course, takes judicial notice of the statutes of the State of Illinois, as a matter of convenience, we here quote that portion of the statute under which the ordinance was passed. Article 5 of Chapter 24, Revised Statutes of Illinois, 1905, defining the powers and duties of the city council, contains among other things, the following provisions:

> "50th. To regulate the sale of meats, *poultry*, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same.
>
> "53rd. To provide for and regulate the inspection of meats, *poultry*, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions.
>
> "75th. To declare what shall be a nuisance, and to abate the same; and to impose fines upon said parties who may create, continue or suffer nuisances to exist.
>
> "76th. To appoint a board of health, and prescribe its powers and duties.
>
> "78th. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

The court next says:

> "From the view the court takes of the case, it becomes unnecessary to pass upon the other questions raised. This suit is brought against the City of Chicago, and certain of its officers in their official capacity. It would seem very

clear that the defendants cannot be held in this court for acts or threats which they have no power or authority from the state to perform, for if there is no ordinance under which they could without any color of reason, claim to be acting, their acts are not the acts of the state, but mere private acts. While it is alleged that defendants acted and claimed to act under the provisions of Section 1161, of the Revised Municipal Code of the City of Chicago, it will be observed, that under no possible construction of the ordinance could defendants claim the right of general stoppage of the entire business of complainant in storing admittedly wholesome articles of food, so that it would seem that these acts were those of mere trespassers, and plainly without the sanction of the state. As to these acts, therefore, the remedy must be in the state courts, there being no constitutional question involved necessary to give the court jurisdiction." (Rec., p. 15.)

Without stopping to inquire, whether any federal question arises out of the outrageous conduct of the officers of the City of Chicago, in attempting to stop complainants' business, there being no authority found in Section 1161 for such outrageous conduct, it is pertinent to point out that such conduct is the necessary and legitimate outgrowth of the doctrine, which would place the police power of the states above the Constitution. Arbitrary power in the hands of executive officers, however honest and well meaning they be, is certain to be abused. But, what shall we say of the danger of such a doctrine, when such power is exercised by dishonest and corrupt executive officers? Not that the writer means to affirm or insinuate that any of the officers of the City of Chicago, made defendants, are either corrupt

or in any sense dishonest, or that in taking the action detailed in this bill, have acted from any improper motive, but, public officials are sometimes corrupt, are sometimes dishonest, and a rule established must be a rule of uniform application, and to say that millions of dollars' worth of property may be destroyed without any process of law, whatever, by reason only of the arbitrary fiat of an executive officer of the health department of the City of Chicago, is not only in plain conflict with the constitution, but is to establish a rule more dangerous than anything that has heretofore been supposed to exist in our institutions.

The court next proceeds to lay down the rule, that the Fourteenth Amendment was not designed to impair the police power of the states; this question has been elsewhere fully discussed in this brief, and will, therefore, not be enlarged upon at this point.

The court then says:

> "It is clearly within the police power to protect the lives and health of the people, by the seizure, condemnation, and destruction of impure and dangerous articles of food." (Rec., p. 16.)

If the court would add to this the qualification that this shall only be done within the limits of the Constitution, and after a notice and hearing, there is of course no doubt about the accuracy of the statement.

The court then says:

> "To require a regular judicial hearing with full opportunity for the owner of the goods to be heard, would often defeat the purposes of the

> law, by tying the hands of the officers entrusted with the duty of guarding the public against the sale of unwholesome food, and would be a serious menace to the lives and health of the people." (Rec., p. 16.)

The question is not whether notice and opportunity to be heard would "defeat the purposes of the law," in some hypothetical case not now before the court, but the question is (conceding for the sake of the discussion, that constitutional limitations will yield to overwhelming necessity), whether notice and an opportunity to be heard with reference to products in cold storage would defeat the purposes of the law, and be a menace to the lives and health of the people? It is perfectly apparent that such notice and an opportunity to be heard would not be a menace in any way to the lives or health of the people; it is perfectly apparent that there is no necessity for great haste; if products were about to be taken out of cold storage and exposed for sale in the market, the law might properly cast upon the officers of the health department authority to temporarily prevent such sale, pending a determination of the character of the products condemned, but there is not the slightest necessity nor justification from any standpoint for immediate destruction.

The court cites the case of *Deems* v. *Baltimore*, 80 Md., 164; 30 Atl. Rep., 648. This is one of the milk cases, of which a number are to be found in the books, and in which it is held that an ordinance providing that it shall be unlawful for any person to sell, or offer for sale, "any impure, adulterated, sophisticated or unwholesome milk, or other food products," and further providing that "milk or food products

in possession of the person or persons so violating, disobeying, refusing or neglecting to comply with the provisions of this ordinance, may be confiscated or destroyed by the inspector examining the same," was not in conflict with the due process of law provision of the Fourteenth Amendment of the Constitution.

It appears in this case that the inspector took certain milk, the property of the plaintiff, on the public highway, and poured the same out upon the street. In justifying this act, however, the Supreme Court of Maryland said:

> "To justify such interference with private rights, its exercise must have for its immediate object the promotion of the public good, and so far as may be practicable, every effort should be made to adjust the conflicting rights of the public and the private rights of individuals. At the same time the emergency may be so great, and the danger to be averted so imminent, that private rights must yield to the paramount safety of the public; and to await in such cases the delay necessary incident to ordinary judicial inquiry in the determination of private rights would defeat altogether the object and purposes for which the exercise of this salutary power was invoked. Whatever injury or inconvenience one may suffer in such cases, he is, in the eye of the law, compensated by sharing the common benefit resulting from the summary exercise of this power, and which, under the circumstances, was absolutely necessary for the protection of the public."
>
> *Deem* v. *Baltimore*, 80 Md., 164; 30 Atl. Rep., 648-*650*.

This, and other similar cases, presents a total different situation than is presented in the case at bar;

where impure milk is found in a milk wagon in the public highway, presumably in process of being sold from house to house, to customers who are no doubt consuming the same within a short time after it is purchased, it indeed presents a case of imminent peril, imperatively demanding instant and drastic action to protect the public health; furthermore, it is to be observed that each item of property thus destroyed is of little value; that it is of such a perishable character that it would be impossible to seize and hold the same, pending a judicial determination of its fitness for human food. There is not the slightest similarity in any respect whatever between this and the other milk cases to be found in the books, and the case of property of the value of hundreds of thousands and indeed millions of dollars, not being offered for sale, kept in cold storage under such circumstances that it is not even deteriorating in quality. In the milk case, there is an actual, imminent, overpowering necessity to destroy property in order to protect the public health; the property is of little value, and of such a character that it is impossible to keep the same for any considerable length of time, pending a judicial determination.

In the case at bar the property is of great value; there is no impediment whatever to keeping it for any reasonable length of time, pending a judicial determination, and the public health is in no wise imperiled pending such determination; in short, in the Maryland milk case, there was a necessity to do that what was done; in the case at bar, there is no necessity to do anything except to prevent the condemned food products from being put on the market and sold for consumption, pending a judicial determination of the

fact, and to any reasonable regulation looking to this end no cold storage company could offer any valid objection. But such is not the ordinance before us for consideration.

In this connection, the court cites 25 Am. & Eng. Ency. L., 146; the question there under discussion is, that of search and seizure in aid of the enforcement of the criminal law. This is a totally different question than the question here under discussion. We have no objection to the inspection of all food products kept in cold storage; we have no objection to any reasonable regulation preventing the sale of such products as the health department may deem unfit for human food, pending a judicial determination of the accuracy of the finding of the health department. The thing we object to is not search or seizure, but summary destruction.

The trial court next cites McQuillan on Municipal Ordinances, Section 431, in which it is said, among other things, that to protect the public health, property "may be seized and confiscated upon legal process, after notice and hearing"; precisely what we are asking for, but it is also said by the authority above referred to, that property "may also, when necessary to insure the public safety, * * * be summarily destroyed by municipal authorities, without previous notice to the owner"; but this can only be done when necessary to insure the public safety, and this is illustrated as follows: "as in the familiar cases of pulling down buildings to prevent the spreading of a conflagration, or the impending fall of the buildings themselves; throwing overboard decayed or infected food, or abating other nuisances dangerous to health." In support of the text above

quoted, the learned author of this work on Municipal Ordinances cites the case of *Blair* v. *Forehand*, 100 Mass., 136, in which a statute authorizing the summary killing of dogs not licensed was sustained, but this was largely upon the ground that dogs are not property in the full sense of the term, and the cases of *Keller* v. *Corpus Christi*, 50 Tex., 614; *Cornwell* v. *Emrie*, 2 Ind., 35; *Hale* v. *Laurence*, 21 N. J. L., 714; 47 Am. Dec., 190, and *American Print Works* v. *Lawrence*, 23 N. J. L., 9, in which it was held that property may be destroyed to prevent the spread of a fire, and the case of *Wallace* v. *Richmond*, 94 Va., 204; 26 S. E., 586, in which it was held that an ordinance of the City of Richmond, Virginia, directing the summary destruction of all liquor within the city, was unauthorized and void, and the case of *Welch* v. *Stowell*, 2 Doug. (Mich.), 332, in which it is held that a house used for a bawdy house cannot be destroyed.

Section 431 of McQuillan on Municipal Ordinances should be read in connection with the next section of the same work, which reads as follows:

> "The legislature may determine the exigency, that is, the occasion for the exercise of the police power, but under our constitutional system, the judiciary determines what are the subjects and objects upon which the power is to be exercised, and the reasonableness of that exercised. *Both the federal and state constitutions protect life, individual liberty, and private property from undue governmental encroachment, although arising by virtue of what is claimed to be within the police power.* Thus laws, whatever may be the intent of the framers, which authorize the confiscation of private property for the mere protection of private rights will be condemned

as unconstitutional. So the legitimate exercise of the police power will not sustain undue interference with the conduct of a lawful business, *or the deprivation of life, liberty or property without due process of law.* But it is universally admitted that however broadly these constitutional principles may be expressed, 'there exists, *ex necessitate rei,* in every government, the power to impose restrictions upon individual life, liberty and property, which it is not within the meaning or intent of such provisions to prohibit or restrain.' *So universal and long continued has been this construction of constitutional inhibitions against governmental deprivation of life, liberty and property of citizens that it may now be considered as written into every constitution.*''

McQuillan Mun. Ord., Sec. 432.

LAWTON V. STEELE, 152 U. S., 133.

This case is next cited by the learned trial court, and quoted from at length; it is believed that this case is the one which really determined the judgment of the trial court, and that it is the one upon which the city will rely in its brief, for an affirmance of the judgment of the trial court; it is therefore entitled to a somewhat extended discussion.

An act of the legislature of the State of New York, prohibited fishing in certain portions of certain lakes of the State of New York, by any device or means whatever, otherwise than by hook and line, or rod held in the hand, and the act further provided that nets found being used in violation of the act are declared to be public nuisances, and may be abated and summarily destroyed, and it was made the duty of every game constable to summarily seize,

remove and destroy nets, when found being used in violation of the provisions of the statute. Nets belonging to one Lawton were seized and destroyed, pursuant to the provisions of this statute; Lawton sued for the value of the nets destroyed, claiming that that portion of the statute which authorizes the summary destruction of the nets was in conflict with the due process of law provision of the Fourteenth Amendment, and therefore void. The act was sustained by the Court of Appeals of New York (119 N. Y., 226; 7 L. R. A., 134), and likewise by this court, his honor Justice Brown writing the opinion; Chief Justice Fuller and Justices Field and Brewer dissenting. A careful study of this case will, it is believed, disclose that there were three ideas which determined the opinion of the majority of the court:

One—the insignificant value of the property, as compared with the considerable expense of a judicial determination of its illegal use and character;

Two—that it was being used indisputably for an illegal purpose; that it was caught in the act as it were; and,

Three—the necessity for immediate action to prevent the further violation of the law. None of these elements exist in the case at bar. Cold storage plants are usually large; the property stored therein is usually of great value. Under the allegation of the amendment to the bill (Rec., pages 8 and 9), all of the property in complainants' plant is in jeopardy. It receives on an average of $20,000 worth per day, and returns to its customers $20,000 worth per day, and it has in storage, property of the aggregate value of $2,000,000. (Rec., page 3.) It

thus appears, that no question can be raised as to the insignificant value of the property in jeopardy.

Nor can it be said that food products in storage are being used for an illegal purpose; it is only after they become decayed, infected or otherwise unfit for human food, that they can be made the subject matter of police condemnation, and even then, while in storage they are not being used or kept for illegal purposes, or as the instruments or means for the violation of any of the criminal laws of the state; but even if it could be said that infected food products kept in storage are being used, like fish nets, for an illegal purpose, still this doctrine cannot be made applicable to the case at bar, to sustain the summary destruction of such products, for the reason that such assumption is to assume the very fact in issue, and upon which we are entitled to be heard. Fish nets in the lakes of the State of New York are inherently, necessarily, inevitably being used for an unlawful purpose; they are *per se* illegal. Whereas, food products kept in storage are primarily and presumptively legal, and being kept for a legal purpose, and even if they are decayed and unfit for human food, they do not become illegal, contraband, or the subject matter for summary destruction, like fish nets kept in the lakes contrary to statute, unless such food products are exposed in the public market for sale.

As to the necessity for the summary destruction of valuable food products kept in cold storage, as has heretofore been pointed out, there is no such necessity; the necessity extends only to preventing the sale to consumers. It thus appears that none of the elements which were controlling in the case of

Lawton v. *Steele* exist in the case at bar. That the value of the property to be destroyed was one of the controlling considerations in the *Lawton* case appears from the following:

> "If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have a good reason to complain of such act as depriving him of his property without due process of law."

Might it not be said with equal emphasis in the case at bar: "If the property were of great value, as for instance, if it were hundreds of thousands, or millions of dollars' worth of food products in cold storage, it would be putting a dangerous power in the hands of the health commissioner to authorize him to summarily destroy such property, and the owner would have good reason to complain of such act, as depriving him of his property, without due process of law"? As to the value of the property thereunder considered, the court says:

> "The value of the nets in question was but $15 apiece; the cost of condemning one (and the use of one is as illegal as the use of a dozen) by judicial proceedings would largely exceed the value of the net, and doubtless the state would, in many cases, be deterred in executing the law by the expense."

On the question of value, also note that the constitutional provisions under consideration are said to be "intended for the protection of *substantial* right of property."

That the fact that the fish nets were being used for an illegal purpose was a controlling factor, appears from the following language:

> "But were the property of little value *and its use for an illegal purpose is clear,* the legislature may declare it to be a nuisance and subject to summary abatement."

That is to say, where a certain class of property can only be used for a certain purpose, and where the property is found being used for such illegal purpose, the property constitutes a nuisance, and if it is of little value, and the necessity is great, it may be summarily abated, as a nuisance, without judicial determination.

A distinction between the legal status of property which can only be used for an unlawful purpose, and which is actually found being used for such unlawful purpose, and that property which is in itself lawful, which is not a nuisance *per se,* has received most extended and learned consideration by the Supreme Court of Nebraska, in the case of *McConnell* v. *McKillip* (65 L. R. A., 610; 99 N. W., 505); in this case certain fire arms were sought to be summarily seized and destroyed, under a statute of the State of Nebraska, purporting to authorize the game warden to take such action. The case of *Lawton* v. *Steele* was relied upon to sustain the statute. The court points out the distinction as follows:

> "The distinction between nets, which, under the laws of the states providing for their destruction, can only be used for an unlawful purpose, and firearms, which, under the laws of this and other states, may be used for many

other purposes, innocent and lawful in their nature, is clearly apparent." (65 L. R. A., 613.)

And again the court says:

"There is a clear and marked distinction between that species of property which can only be used for an illegal purpose, and which, therefore, may be declared a nuisance and summarily abated, and that which is innocent in its ordinary and proper use, and which only becomes illegal when used for an unlawful purpose. We know of no principal of law which justifies the seizure of property, innocent in itself, its forfeiture, and the transfer of the right of property, in the same from one person to another as a punishment for crime, without the right of a hearing upon the guilt or innocence of the person charged before the forfeiture takes effect." (65 L. R. A., 615.)

That necessity was also a controlling consideration with this court in *Lawton* v. *Steele* appears from the following:

"It is evident that the efficacy of the statute would be very seriously impaired by requiring every net illegally used to be taken very carefully from the water, carried before a court or magistrate, notice of the seizure to be given by publication and regular judicial proceedings to be instituted for its condemnation."

It is further pointed out that:

"They (the nets) can only be removed from the water with difficulty, and were liable to injury in the process of removal."

Thus we find fish nets in the prohibited waters of the lakes of New York, a nuisance *per se*, under the statute, indisputably used in violation of the law,

every instant they remain is a continued violation of the law, and endangers the lives of the fish intended to be protected. We find that the nets cannot be removed from the waters of the lake, and kept intact; under these circumstances, there is manifactly an overpowering necessity for summary destruction in order to prevent the further violation of the law. Between this situation and that of food products, presumptively wholesome, not being used for any illegal purpose, kept in cold storage, there is no similarity whatever. In the latter case not the slightest necessity exists for summary destruction.

In concluding the discussion of this case, we make bold to suggest, that the statute of New York there under consideration was, in the language of the Court of Appeals of New York, "very near the border line" of unconstitutionality (119 N. Y., 226; 7 L. R. A., 134, *138;* 16 Am. St. Rep., 813; 23 N. E., 878); in short, in drawing the line between constitutional limits upon one hand, and the police power of the state upon the other, in the case under consideration, this court has pushed the police power to the extreme limit to which it is possible to extend it without denying constitutional limitations as being the supreme law of the land. It is believed that it is not possible for this court to further extend the police power and that there will be no disposition to do so.

The dissent of Chief Justice Fuller and Justices Brewer and Field tends to confirm the opinion of the Court of Appeals of New York, that the statute was "very near the border line."

The police power, unrestrained by constitutional

limitations of due process of law, unmodified by that ideal of justice (an opportunity to be heard in defense of one's liberty or his property) which has been the goal of every civilized people since the world began, must inevitably lead to despotism, but when so modified, it is one of the greatest engines for good to be found in our institutions.

If this court shall push the police power beyond the limits laid down in *Lawton* v. *Steele*, will it not destroy this happy medium between effective police regulation and constitutional limitations, which has heretofore prevailed, and convert the police power into an unrestrained instrument of despotism? We make bold to suggest, that no case has ever been presented to this court, and none can be, affecting property and property rights, which challenges its more serious consideration.

The Destruction of the Property Destroys the Evidence of its Character.

If this ordinance is sustained the health commissioner may, without the slightest notice to the bailee or owner, summarily seize and destroy a hundred thousand dollars' worth of property—wholesome meat, for instance, upon the claim that it is decayed and unwholesome. After it is destroyed how is it possible for the owner or the bailee to prove, in an action of law, for the recovery of damages, or any other judicial proceedings of any kind or character, that the meat was in fact wholesome. The destruction of the property destroys the evidence; the only evidence which must determine the issue of fact. Can anything be more monstrously unjust than this? Was it contemplated by the framers of the Four-

teenth Amendment to the Constitution that these things could be done in regard to valuable property rights, where there is not the slightest necessity for such action, and still be called due process of law?

If it be suggested that the burden of proof is upon the health commissioner to justify his action, and prove affirmatively that the meat was unwholesome, still the difficulty is in no wise removed; any public officer who would take such action would be driven, in self defense, to at least give it, as his opinion, that the property destroyed was unwholesome, and as against this opinion, the owner or bailee is absolutely helpless. The only ultimate source of evidence, the property itself, is destroyed.

In the fish net case, this objection does not arise; the destruction of the nets would not destroy any evidence. The only question of fact that could arise would be: Were the nets in the prohibited waters of the lakes of New York? The existence or nonexistence of the nets would in no wise effect the evidence on this point.

Decayed Food Products Valuable as Property for Other Purposes than Food.

The court takes judicial notice of matters of common knowledge and public history, including the scientific discovery of new and valuable uses of products, at one time supposed to be of no value; therefore, the court knows judicially, although nothing of the kind appears affirmatively in the bill, that meat and other food products so far decayed as to be unfit for human food, may have, and in fact, have, a substantial value, for other purposes than consump-

tion as food. A large part of the fertilizers now in common use are made, in part, of meat and other food products unfit for consumption. The grease from meat, wholly unfit for consumption as food, may be made into soap. Eggs so far decayed as to be unwholesome for food are valuable for tanning purposes. Science has so far been able to discover new uses for the products of the slaughter house that are not fit for human consumption, that nothing remains that is wholly without value.

If decayed food products are still valuable as property, for legitimate purposes other than consumption for human food, there can be no possible justification for their destruction; they are entitled to the same protection under the Constitution as wholesome food products.

THE FOOD PRODUCTS IN QUESTION WERE IN FACT WHOLESOME.

Under the allegations of the bill to which a demurrer was sustained, we find that the food products in controversy in this case were in fact wholesome. From the bill we read:

> "Your orator further complaining says that it is informed and believes and therefore charges the fact to be that said poultry is in a clean and wholesome condition and that the same has not become putrid, decayed, poisoned of (or) infected, or in any other manner rendered or made unsafe or unwholesome for human food." (Rec., page 3.)

If this ordinance is valid the health commissioner of the City of Chicago may, by his arbitrary *ex parte* decree, render unwholesome that which is wholesome, may be prosecutor, judge, jury and ex-

ecutor in one, and by denying to the owner an opportunity to be heard, may destroy thousands or hundreds of thousands of dollars' worth of perfectly wholesome food products, thereby not only destroying the property without any opportunity to be heard, but at the same time, destroying the only evidence of its wholesomeness or unwholesomeness.

It is respectfully submitted that Section 1161 of the Revised Municipal Code of Chicago is in conflict with that due process of law provisions of the Fourteenth Amendment to the Constitution of the United States, and that the judgment of the trial court should be reversed, with instructions to overrule the demurrer.

All of which is respectfully submitted.

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Solicitor for Complainants.

W. H. Sears,
Of Counsel.

Office of the Clerk, U. S.
FILED.
DEC 12 1907
JAMES H. McKENNEY,
Clerk.

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28.

No. [redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

[redacted]

NORTH AMERICAN COLD STORAGE COMPANY,
Appellant,

vs.

CITY OF CHICAGO and CHARLES J. WHALEN et al.,
Appellees.

REPLY BRIEF OF APPELLANT.

L. A. STEBBINS,
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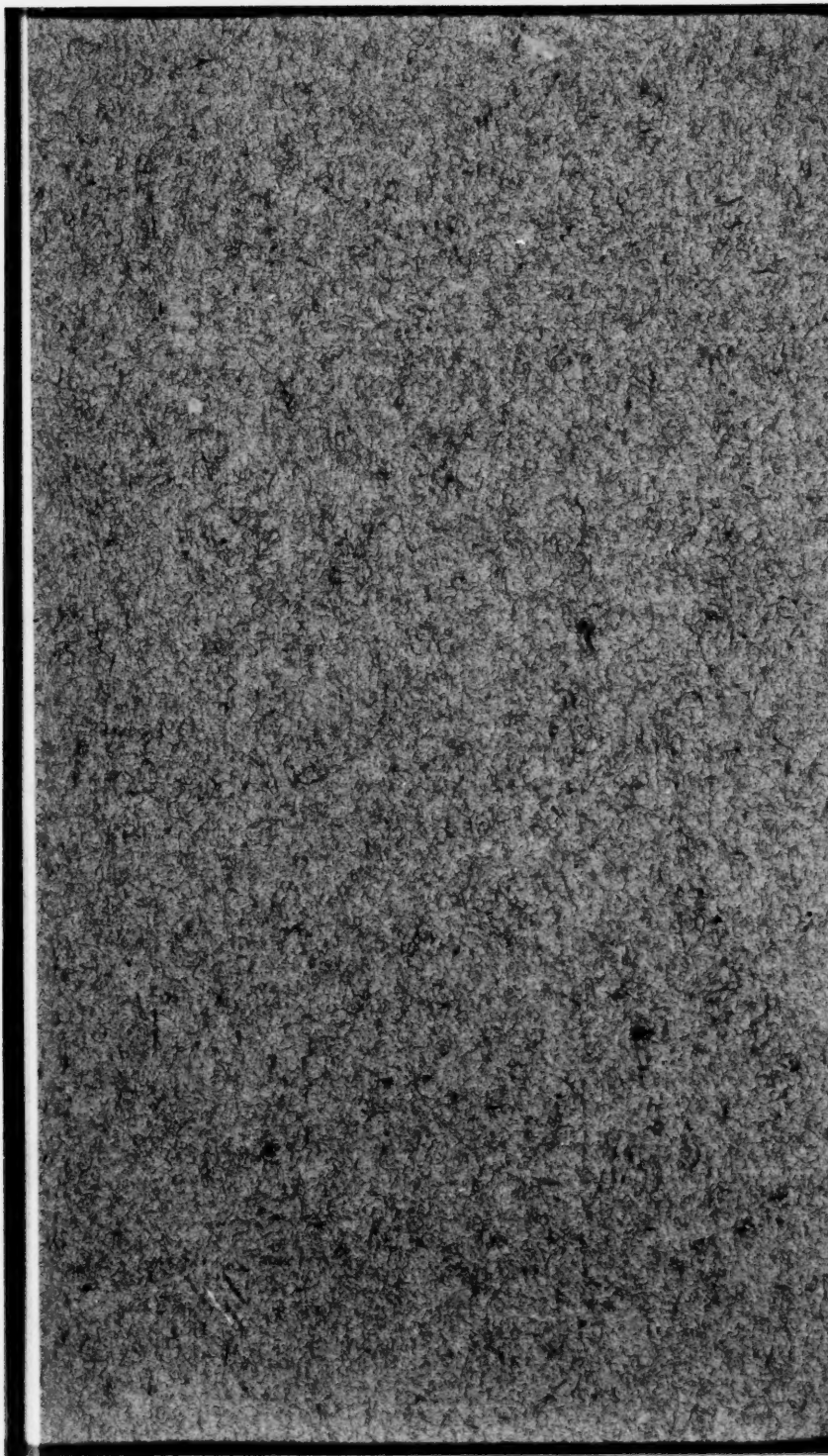
Geo. Buchanan Co., Printers, Chicago.



IN THE

Supreme Court of the United States

No. 622.

NORTH AMERICAN COLD STORAGE COMPANY,
Appellant,

vs.

CITY OF CHICAGO and CHARLES J. WHALEN et al.,
Appellees.

REPLY BRIEF OF APPELLANT.

Some things in appellees' brief require notice and reply:

Appellees in attempting to state the position of appellant, say, "Appellant does not object to the search or seizure provided for in the ordinance (Appellant's Brief, page 46)," (Appellees' Brief, page 1). Again appellees say, "Counsel raises no objection as to the seizure (Appellant's Brief, page 46)," (Appellees' Brief, page 5). What was said in appellant's brief on pages forty-five and forty-six on this subject will not bear this construction. It was said in the case at bar, "There is no necessity to do anything except to prevent the condemned food product from being

put on the market and sold for consumption pending a judicial determination of the fact, and to any reasonable regulation looking to this end no cold storage company could offer any valid objection, but such is not the ordinance before us for consideration" (Appellant's Brief, pages 45 and 46). What such regulations, looking to the preventing of condemned food products being put upon the market and sold for consumption would be, was not attempted to be stated. No duty rested or rests upon appellant to indicate what ordinance would be valid. Its duty is limited to a demonstration that the ordinance now before the court denies due process of law. The appellant, however, did not have in mind, nor has it now in mind, nor does it believe that there was or is any necessity whatever for the seizure of food products found in cold storage, if by seizure is meant (as we presume it is) a forcible removal of the goods from the cold storage plant by the city. All that would be necessary to prevent food products held in cold storage, that might be condemned by the city, from being sold, would be to place a condemnation tag upon such goods and make it an offense (with appropriate punishment) for the warehousemen to permit them to go out of the warehouse until there is a determination as to their fitness for human food and if it was determined that they were unfit they could then be destroyed by the city, if they had no value for other purposes. This correction is of no great importance, inasmuch as the destruction provided for in the ordinance is the thing most seriously complained of. It is deemed necessary and appropriate, however, to set appellant right be-

fore the court and in the interest also of clearness of statement.

A further statement on page 5 of appellees' brief is worthy of notice: "It will be impracticable if not absolutely impossible to put an officer who only works eight hours to a shift, on guard for twenty-four hours of each day to prevent the actual sale of such infected food until a final judicial determination confirming the inspector's finding, especially when, in a single day, during the hot summer months, there may be from 75 to 100 separate and distinct condemnations of food and vegetables, ranging from a basket of peaches to 100 barrels of chickens, in as many different grocery stores, meat markets, fruit stands and cold storage warehouses, starting with the largest stores in the down-town districts and touching the most remote corners of the city." (Appellees' Brief, page 5.)

This line of argument proceeds upon two erroneous assumptions, (1) that appellant does not object to seizure and therefore impliedly admits that all this would be necessary, and (2) that the case at bar has to do with grocery stores, meat markets, fruit stands, stores in the down-town districts and touching the most remote corners of the city. The case at bar has only to do with those large institutions where food products are kept for storage and not for sale, where such products are kept in large quantities and presumably by responsible and law abiding persons, firms and corporations. There would not be for such institutions many separate and distinct condemnations each day and it would not be necessary to stand guard over such products. It would only be necessary [illegible] them, take an

inventory of the same and make it a crime for the custodian to permit them to go out of the warehouse pending a determination as to their wholesomeness.

As to the Police Power Being Within the Limits of the Constitution.

It is apparently argued, rather by innuendo than by direct statement, however, in line with the apparent holding of the trial court, that the police powers of the state are not subject to the restrictions of due process of law embodied in the Fourteenth Amendment. This question was fully discussed in appellant's main brief, pages 10 to 17, inclusive, but the authorities cited by appellees are worthy of notice as fully confirming the position taken by appellant that the police power is subject to constitutional restrictions. Take the Massachusetts vaccination case, cited by appellee. This court, through His Honor, Justice Harlan, said "The mode or manner in which those results (preservation of the public health) are to be accomplished, is within the discretion of the state, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a state or any regulation adopted by a local governmental agency, acting under the sanction of state legislation, shall contravene the constitution of the United States, nor infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on acknowledged police powers of the state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the constitution, or with any right which that

instrument gives or secures." (*Jacobson* v. *Massachusetts*, 197 U. S., 11, 25; 49 L. Ed., 649.)

Again the court says in the same case:

> "We say necessities of the case because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner or might go so far beyond what was reasonably required for the safety of the public as to authorize or compel the courts to interfere for the protection of such person." (Page 28.)

In the Detroit garbage case cited in appellees' brief, page 20, this court, through His Honor, Justice Harlan, recognized the necessity of police regulations conforming to due process of law and the ordinance in question was only sustained because it was held to embody due process of law. The court says, "Those ordinances cannot, therefore, according to well settled principles, be held to be wanting in the due process of law required by the Constitution." (*Gardner* v. *Michigan*, 199 U. S., 325; 50 L. Ed., 217.) In the companion case from San Francisco, involving the same point, in which the opinion was delivered at the same time and written by the same justice, this court said, defining the constitutional limits of the police power "Taking care always that no regulation, although adapted for those ends (the preservation of the public health) shall violate rights secured by the fundamental law nor interfere with the enjoyment of individual rights beyond the necessities of the case." (*California Re-*

duction Company v. *Sanitary Reduction Company*, 199 U. S., 306, 319; 50 L. Ed., 210.)

So much has been said by the learned trial court in this case and by counsel for the city about the Fourteenth Amendment not impairing the police power of the states, as such a power existed prior to the adoption of that amendment, that it becomes pertinent to inquire briefly: Is the police power of the states, aside from any constitutional limitation, to be enforced in such manner as to violate those fundamental principles of natural right, which find expression in the Fourteenth Amendment? Was the legitimate sphere of the exercise of the police power aside from any constitutional limitation recognized as being so broad as to permit the states to deprive one of life, liberty and property, without those opportunities to be heard which are now recognized as being the constitutional limitation of due process of law? In other words, prior to the adoption of the Fourteenth Amendment, and leaving out of view any limitation embodied in the state constitutions, was it recognized as legitimate for the states to deprive a citizen of his property under the guise of a police power without any notice or opportunity to be heard? Was not the law before the adoption of the Fourteenth Amendment the same as it is now, except that now the denial of due process of law raises a federal question conferring jurisdiction upon the Federal Court, whereas before it would simply have raised a question of general jurisprudence determining the legitimate limits of the exercise of the police power. In *Munn* v. *Illinois*, 94 U. S., 113; 24 L. Ed., 83, Chief Justice Waite said

"While this provision (for due process of law) of the Amendment (the Fourteenth) is new in the Constitution of the United States, as a limitation upon the powers of the states, it is as old as a principle of civilized government." The case in which the learned justice used this language was one in which the police power of the states was drawn directly in question and one in which the court says "it is not unmindful of the vast importance of the question involved" and "we have kept the cases long under advisement in order that their decision might be the result of our mature deliberations." If it is meant by the learned trial court and counsel for the city that the Fourteenth Amendment has in no wise changed the police power of the states because the legitimate exercise of the police power never permitted them, under the general principles of jurisprudence, to deprive one of his property without due process of law, which is probably correct, then indeed the Fourteenth Amendment has in no wise changed the law except that where due process of law is now denied under the police power the question raised is a federal question rather than one of general jurisprudence.

"Whether this Particular Ordinance is a Valid and Proper Exercise of that Power."

(Appellees' Brief, page 14.)

Under this head appellees lay down what they conceive to be the fundamental principles which test the validity of the exercise of the police power by the states. Three rules are laid down and then counsel for appellees proceeds to demonstrate that the ordinance in question does not violate any of these

rules. In this counsel for the city is setting up a man of straw and knocking him down for his own amusement. It is not denied that all three of the prerequisites to the valid exercise of the police power (Appellees' Brief, pages 14 and 15) laid down by counsel are sound, nor is it denied that this ordinance (leaving out of consideration the ambiguous word "appropriate" in the third proposition) conforms to the three rules laid down by counsel. In short, it is not denied that the object of the city in enacting the ordinance in question, was the preservation of the public health. It is not denied that even the destruction of condemned goods in cold storage without a hearing would have some substantial connection between the assumed purpose of the enactment and the actual purpose thereof, nor is it denied that such destruction would, in some appreciable manner (assuming that the goods were in fact putrid) tend toward the accomplishment of the object for which the power was exercised. The difficulty with counsel's argument in this respect is that he wholly omits a fourth proposition, which is equally vital and fundamental, to-wit: the manner of the exercise of the acknowledged police power, though the thing sought to be done tends to preserve the public health, must still conform to due process of law. What is due process of law must be determined in each case according to the facts and circumstances of that particular case. That which in one case would be an outrageous exercise of arbitrary power might in another case, by reason of the overwhelming necessities of the case be due process of law. Thus to seize and summarily destroy, without notice or hearing, thousands of dollars' worth

of property held in cold storage, not exposed or offered for sale, in the custody of responsible parties, amenable to the criminal law, thereby destroying the evidence available for a final determination as to whether the products were in fact putrid or not, would be such outrageous exercise of arbitrary power; whereas a summary seizure and destruction of clothing believed by the Health Department to be infected with smallpox germs, or the destruction of a building in the pathway of a conflagration, or possibly (though this is a debatable question) the destruction of a fish or a basket of grapes thought by the Health Department to be putrid and being exposed in the market for sale, might not be.

"Summary Destruction of Wholesome Food Products."

(Appellees' Brief, page 22.)

Under this head counsel seeks to defend the ordinance in question upon the ground that it only authorizes the destruction of putrid, decayed, poisoned or infected food products and complains that counsel for appellant neglected to confine himself to the issue actually presented by the record and permitted his imagination to soar to precipitate heights in observing that "If this ordinance is valid representatives of the Health Department of the City of Chicago may at any moment appear at the cold storage plants of the appellants, may demand instant admission and may instantly, upon being admitted to the plant, condemn every dollars' worth of the food products therein contained, which, under the demurrers, is admitted to be of the value of

$2,000,000, and may instantly seize and utterly destroy every dollar's worth of said property. No notice of any kind or character, no opportunity to be heard before anybody on any question of fact whatsoever." And again: "If this ordinance is valid the health commissioner of the City of Chicago may, by his arbitrary or *ex parte* decree render unwholesome that which is wholesome, may be prosecutor, judge, jury and executioner in one, and by denying to the owner an opportunity to be heard, may destroy hundreds or thousands of dollars' worth of perfectly wholesome food products," etc. Appellees' criticism of the foregoing is fallacious for the manifest reason that it assumes the whole point in issue upon which appellant is entitled to a hearing, that the products in fact were putrid, decayed, poisoned or infected. This cannot be known in advance of a hearing and under the claim that they are putrid they may be taken and destroyed by the health department; whereas it may ultimately appear that they are not. Counsel for appellee says, "What counsel undoubtedly started out to contend before his enthusiasm carried him to such deep water, is that even though the condemned food is putrid, decayed, poisoned, infected, rancid or rotten, worm-eaten, death dealing and germ spreading, still the officers are absolutely without authority to destroy such condemned food because the ordinance does not provide for a judicial determination of the unwholesomeness of such food before it is in fact destroyed." (Appellees' Brief, page 25.) This is not a correct statement of our whole contention, nor was our contention made under the influence of undue enthusiasm. We in-

tended to contend exactly what we did contend and our contention was correct. To say that the Health Department can only condemn unwholesome food products, is as before pointed out, to assume the whole point of the controversy, the whole point upon which we are demanding a hearing, the whole point upon which we are denied due process of law, and in this connection it is pertinent to observe that appellees' contention that if under the demurrer we accept the statement that the poultry was not putrid, then the face of the record shows that the alleged acts of the commissioner and his inspectors were tortious and outside of the rights granted by the ordinance and entirely without warrant or authority and the court must assume that the officers proceeded in their private and individual capacity and not under the ordinance and this court is therefore without jurisdiction to extend any relief. (Appellees' Brief, page 25.) This is unsound, first, because they were in fact under the allegations of the bill proceeding under the ordinance, but were simply laboring under a misapprehension of fact, and, second, because any taking of property by the state without due process of law is an invasion of the constitutional rights of the citizen and confers jurisdiction upon the Federal Court, whether it be done pursuant to a law or ordinance or not.

THE PROHIBITION EXTENDS TO EVERY AGENCY OF THE STATE.

> "They (the due process of law provisions of the Fourteenth Amendment) have reference to the actions of the political body denominated a

Raymond vs. Chgo. Union Traction Co., Sup. Ct. U.S. Oct. 21st 1907

> state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it." (*Ex parte Virginia*, 100 U. S., 339; 25 L. Ed., 679.)

It has also been held that the Fourteenth Amendment rendered void a judgment of the Probate Court that a person absent for seven years was dead and granting letters of administration on his estate, when in fact he was alive, although such judgment had been confirmed by the highest court of the state. (*Scott* v. *McNeil*, 154 U. S., 34.)

In McGehee on Due Process of Law, we read:

> "A municipal ordinance so enforced by the authorities charged with its administration as to work a substantial deprivation of rights to a particular class of residents, is also void within this prohibition." (Page 28.)

In the *Yick Wo* case this court said:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and

> administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (*Yick Wo* v. *Hopkins*, 118 U. S., 373; 30 L. Ed., 227.)

These authorities seem to meet counsel's contention that the act of the health officers of the City of Chicago in seizing food products that are not putrid or decayed would raise no federal question. Any act of the state, whether of its legislative, executive or judicial department, or any sub-division of the state, created by the state, acting through its officers and claiming to act in their capacity as officers and with the pretense of lawful authority which takes life, liberty or property without due process of law is within the provisions of the Fourteenth Amendment and raises a federal question which confers jurisdiction upon the Federal Court.

This thought is further illustrated by the long line of cases in this court defining the rights of the states to enact police regulations, fixing maximum charges for the use of property clothed with a public use. (*Munn* v. *Illinois*, 94 U. S., 113; 24 L. Ed., 77; and the four following cases.) In these cases it was held that it was within the police power of the several states to fix rates of compensation to be charged by public warehouses and common carriers and that such fixing was a legislative and not a judicial function. Yet in the long line of cases which subsequently followed, of which *Smythe* v. *Ames*, 169 U. S., 466; 42 L. Ed., 819, is typical, and in which it

appeared from testimony adduced in court, that a law, though fair and reasonable upon its face, in its general operation as to certain persons or classes of persons was a deprivation of their property without due process of law, though they were in their general scope admittedly proper police regulations, it was held they were in conflict with the Fourteenth Amendment and such conflict raised a federal question for the final determination of this court. A police regulation may be entirely reasonable and valid as to one person or class of persons and yet identically the same regulations be unreasonable and invalid as to another class of persons. A police regulation may be valid today and, by reason of changing conditions, be invalid tomorrow. This is illustrated by the decree that is actually entered in *Smythe* v. *Ames* by His Honor Justice Brewer, while sitting as Judge of the Circuit Court. He held, and this was affirmed by this court, that as to the persons then before him and under the testimony then adduced, the act deprived such persons and corporations before him of their property without due process of law. He therefore enjoined the further enforcement of the act by the duly constituted authorities of the state of Nebraska, but, recognizing that changing conditions might change the operation of the act he said, in closing the opinion, "It may be that as the volume of business increases the time will come when the rates fixed by this House Roll No. 33 will be reasonable and just." So he held that there should be entered a proviso to the decree that if at any time the defendants should wish a re-investigation by the court as to the reasonableness of the rates, etc.,

they might call for such investigation. (*Ames* v. *U. P. R. R.*, 64 Fed., 189.)

So, if the health officers of the City of Chicago seek to take perfectly wholesome food products from appellant upon a false claim that they are unfit for human food and to destroy them under the pretended authority of the ordinance in question, this invades a right guaranteed by the Constitution of the United States, raises a federal question and confers jurisdiction upon this court; but appellant does not care to have the court consider the case in this narrow view but rather in the light of the larger inquiry as to the validity of the ordinance in question and what is here said on this subject is said merely to meet the contention of counsel for the city, that the case being decided upon demurrer and the demurrer admitting that the food products more especially drawn in question were in fact not putrid or decayed, etc., the case is robbed of its federal aspect and this court has no jurisdiction. (Appellees' Brief, page 25.)

Appellant's Right to Sue for Damages After the Property is Destroyed.

The writer nowhere finds it directly stated in appellees' brief but much of the argument and a number of the authorities cited (especially from state courts) seem to proceed upon a contention, which, if put into the form of a definite proposition would read (as near as the writer can gather) somewhat as follows:

Assuming the ordinance to be void because it denies due process of law, still its enforcement by the City will not be enjoined because appellant has its

remedy by an action at law for the value of the property destroyed against the officers destroying the same after its destruction.

This contention, made inferentially rather than directly, perhaps requires some notice. As was remarked by His Honor Justice Holmes, in *Chandler* v. *Dix*, 194 U. S., 592; 48 L. Ed., 1131, "Injunctions against officers proceeding unconstitutionally under color of their office are well known." The writer knows of no case in which the enforcement of an unconstitutional law has not been enjoined where such injunction was asked for and the cases cited in counsel's brief upon which he bases this contention, may all be brought under one or the other of the following heads:

(1) Actions at law for damages against officers for the destruction of property upon the finding of the officer that it was a fit subject for destruction where it was held that such finding was not final and where no injunction against the enforcement of the law had been asked, or

(2) Cases where there was some real overpowering necessity for an immediate action on the part of the public officer in order to preserve the public health, in which cases it was held due process of law is not violated by an immediate destruction, leaving the owner of the property to his action at law for damages, in which action the preliminary decision of the public officers as to the condition of the property may be re-examined.

That an action for damages would lie against the health officers of the City of Chicago should they destroy any part of the property in question, should it be made to appear that such property was whole-

some, we do not deny, but that there is any necessity for such destruction under the circumstances presented by the bill, we do deny. Furthermore, the remedy at law would be wholly inadequate. Under the bill not only one destruction is threatened, but an indefinite number of destructions, during an indefinite period in the future are threatened, placing all the property of the appellant in jeopardy for an indefinite length of time. Surely a large number of different actions at law for damages against individual officers of the City of Chicago would not be adequate relief.

The amendment to the bill alleges that the health officers of the City of Chicago "claim the right, under said Section 1161 of the Revised Municipal Code of the City of Chicago, 1905, to summarily destroy from time to time any and all products stored in the said warehouse and cold storage plant of your orator, which they or either of them may condemn as being putrid, decayed, poisoned, or infected, or unfit for human food, without any judicial determination of the fact that such products are in such condition, and they, the said defendants, are now threatening to summarily destroy from time to time, pursuant to the provisions of the said Section 1161 of the Revised Municipal Code of 1905 of Chicago, any and all food products which may be condemned by them or either of them as being putrid, decayed, poisoned, or infected or unfit for human food, without any judicial determination of the fact that such products are in such condition." (Record, pages 8 and 9.) Surely individual actions for damages at law would be no adequate relief against this condition, but there is, if possible, a more conclusive reason why

the remedy at law would be inadequate. The instant seizure and destruction of property destroys the only evidence of its condition. The health officers of the City of Chicago suddenly appear at appellant's plant, instantly seize and destroy certain poultry, claiming it to be infected with disease germs. After its destruction in an action for damages the health officers swear that they found the infectious germs. They may have been mistaken or they may have been corrupt and dishonest. No samples of the poultry remain. The appellant was given no opportunity to have experts examine the poultry; the appellant is utterly helpless. The destruction of the poultry destroys the only evidence of its character. For these reasons and others the remedy at law is wholly inadequate.

We again respectfully submit that Section 1161 of the Revised Municipal Code of the City of Chicago is in conflict with the Fourteenth Amendment to the Constitution of the United States in that it denies due process of law to the appellant and therefore should be declared by this court null and void.

L. A. STEBBINS,
Solicitor for Appellant.

W. H. SEARS,
Of Counsel.

Office Supreme Court, U. S.
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OCT 12 1907
JAMES H. McKENNEY,
CLERK

No. 28.

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES,

NORTH AMERICAN COLD STORAGE COMPANY,
Appellant.

vs.

CITY OF CHICAGO, CHARLES J. WHALEN, et al.,
Appellees.

Appeal from the United States Circuit Court, Northern District of Illinois, Eastern Division.

Brief and Argument of Appellees.

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IN THE

Supreme Court of the United States

NORTH AMERICAN COLD STORAGE COMPANY, *Appellant,* vs. CITY OF CHICAGO, CHARLES J. WHALEN et al., *Appellees.*	Appeal from the United States Circuit Court Northern District of Illinois, Eastern Division.

BRIEF AND ARGUMENT OF APPELLEES.

STATEMENT.

MAY IT PLEASE THE COURT:

It is conceded

First. That the City of Chicago passed an ordinance providing for the inspection, seizure, condemnation and destruction of *putrid, decayed, poisoned and infected food.*

Second. That the provisions of the ordinance relative to the proper care and preservation of food together with the inspection thereof is highly proper and in no wise infringes any constitutional right (appellant's brief, 19).

Third. Appellant does not object to the search or seizure provided for in the ordinance (appellant's brief, 46).

Fourth. Appellant DOES object to the summary destruction of food inspected and condemned (appellant's brief, 46) and contends that if appellees are permitted to act under the ordinance and seize and destroy the property they have inspected and condemned without securing a judicial determination confirming the finding of the health officers that the food inspected is in fact putrid, decayed, poisoned and infected, that it will deprive appellants of the property in question without due process of law and that such deprivation is in conflict with the Fourteenth Amendment to the Constitution of the United States.

BRIEF.

Police Power.

22 American & English Encyclopedia of Law, 2nd Edition, 915.

Beer Co. v. *Massachusetts*, 97 U. S., 25, 33.

Leisy v. *Hardin*, 135 U. S., 100, 128.

Parker & Worthington's Public Health & Safety, page 2.

Brannon on the Fourteenth Amendment, pages 167 and 175.

Barbier v. *Connolly*, 113 U. S., 27, 31.

Mugler v. *Kansas*, 123 U. S., 623, 664, 665.

Fertilizing Co. v. *Hyde Park*, 97 U. S., 659, 667.

In re Rahrer, 140 U. S., 545, 554.

Powell v. *Pennsylvania*, 127 U. S., 678, 683.

Patterson v. *Kentucky*, 97 U. S., 501, 504.

The Ordinance is a Valid and Proper Exercise of Police Power.

Mugler v. *Kansas*, 123 U. S., 623, 661, 669.

Lawton v. *Steele*, 152 U. S., 133, 136.

Parker & Worthington's Public Health & Safety, page 6.

Powell v. *Pennsylvania*, 127 U. S., 678, 684.

In re Jacobs, 98 N. Y., 98, 115.

Jacobson v. *Mass.*, 197 U. S., 11, 27, 30.

Gardner v. *Michigan*, 199 U. S., 325, 332.

City of Chicago v. *Netcher*, 183 Ill., 104, 111.

Power of Summary Destruction of Unwholesome Food Products.

Freund on Police Power, Sections 520, 521.

Powell v. *Pennsylvania*, 127 U. S., 678, 685.

People v. *Durston*, 119 N. Y., 569, 578.

Compagnie Francaise, etc., v. *Board of Health*, 186 U. S., 380, 392.

A Notice and Hearing before the Summary Abatement of a Nuisance is not Necessary.

McGehee on Due Process of Law, page 372.

People v. *Board of Health*, 140 N. Y., 1, 23 L. R. A., 481.

Parker & Worthington's Public Health & Safety, Section 175.

City of Salem v. *Eastern R. Co.*, 98 Mass., 431, 443.

Miller v. *Horton et al.*, 152 Mass. 540, 543.

Stone v. *Heath*, 179 Mass., 385, 386.

Health Department v. *Rector*, 145 N. Y., 32.

Lowe v. *Conroy*, 120 Wis., 151, 155, 156.

Daniels v. *Homer*, 139 N. C., 219.

Blue v. *Beach*, 80 American State Reports, 212, 218.

Egan v. *Health Department*, 20 Misc., 38, 45 N. Y. Supplement, 325.

Pearson et al. v. *Zehr*, 138 Ill., 40, 51.

State v. *Main*, 69 Conn., 123, 136, 138.

Gaines v. *Waters*, 64 Ark., 609, 612.

Booth v. *People*, 186 Ill., 43, 48.

ARGUMENT.

Appellees contend that the ordinance is not only a valid exercise of the police power, but that the provision giving the health officer the right to destroy the infected food, is a necessary adjunct to the right to inspect, condemn and seize in order that the public may be properly guarded against infectious diseases. Counsel raises no objection as to the seizure (appellant's brief, 46). We believe the court will take judicial notice of the fact that the city has no facilities for storing infected food after seizure, and that in a large city like Chicago with a population of two and one-half million people and with an area of nearly 200 square miles, it would be impracticable, if not absolutely impossible to put an officer (who only works eight hours to a shift) on guard for twenty-four hours of each day to prevent the actual sale of such infected food until a final judicial determination confirming the inspector's finding—especially so when in a single day during the hot summer months there may be from 75 to 100 separate and distinct condemnations of fruit and vegetables ranging from a basket of peaches to 100 barrels of chickens, in as many different grocery stores, meat markets, fruit stands and cold storage warehouses, starting with the largest stores in the downtown district and touching the most remote corners of the city. We believe the court will also take judicial notice of the law's delays, the rights of appeal and the enormous expense such a system would entail. This inspection was made October 2, 1906.

It must be conceded, OR THIS COURT IS UNQUESTIONABLY WITHOUT JURISDICTION, that the ordinance was passed under the police powers of the City of Chicago properly delegated to it by the State of Illinois and the exhaustive argument beginning with the story of Adam (appellant's brief, 10), running through the writings of the Apostle St. John, and culminating with a reference to the more recent case of *Lawton* v. *Steele*, when stripped of all its verbiage and surplusage presents the single question as to whether or not the right to destroy infected food as provided in the ordinance is a valid exercise of the police power granted to the City of Chicago.

> "*Health being the sine qua non of all personal enjoyment, it is not only the right, but the duty of a state or of a municipality possessing the police power to pass such laws or ordinances as may be necessary for the preservation of the health of the people.*"
>
> 22 Am. & Eng. Enc. Law, 2nd Ed., 922.

Such ordinances when so passed are enacted by virtue of the police power vested in the municipality.

POLICE POWER.

Many attempts have been made to define police power, but jurists and authors have universally conceded that it is impossible to frame any definition of police power by absolutely indicating definite limits including everything to which it may extend and excluding everything to which it cannot by any possibility extend, it being considered infinitely more desirable to decide each case in accordance with

the merits of that particular case. There are, however, a great many general definitions and they have been well epitomized in the following words:

> "The police power in its broadest acceptation means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest."
>
> 22 Am. & Eng. Enc. of Law, 2nd Ed. 915.

In discussing the same question Mr. Justice BRADLEY said:

> "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it there seems to be no doubt that it does extend to the protection of the lives, *health* and property of the citizens, and to the preservation of good order and public morals. The Legislature cannot by any contract, devest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise."
>
> *Beer Co.* v. *Massachusetts*, 97 U. S., 25-33.

In a more recent case Mr. Justice GRAY said:

> "The police power includes all measures for the protection of the life *the health*, the property and the welfare of the inhabitants, and for the promotion of good order and the public morals. It covers the suppression of nuisances, whether injurious to the public health, like unwholesome trades or to the public morals, like

gambling houses and lottery tickets. * * * The police power extends not only to things intrinsically dangerous to the *public health, such as infected rags or diseased meat,* but to things which, when used in a lawful manner, are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the life, health or morals of the people."

Leisy v. *Hardin,* 135 U. S., 100-128.

The police power is inherent in the several states and is left with them under the federal system of government, and may always be exercised by the state legislatures, and the federal government cannot exercise any police power except where Congress has specifically excluded all state legislation, as, for example, the District of Columbia, where the police power of Congress is the same as that of the state legislatures within their respective jurisdictions; *and being a right which the federal government never had, it would be impossible to impair or abridge that right by the adoption of the Fourteenth Amendment.*

His Honor, Judge Christian C. Kohlsaat, in his opinion in this case (Record, 15), well said:

> "The Fourteenth Amendment does not impair the police power of the states. This was a power not surrendered by the states to the federal government, and is an inherent right of every sovereignty."

In further support of this proposition Messrs. Parker & Worthington, in their work on Public Health and Safety, at page 2, say:

> "In respect of its internal police, the authority of each of the states is supreme and exclusive. By the act of union, the separate and independent states surrendered to the general

government, thereby established, such powers, and such only, as were deemed to be necessary to enable it to provide for the common defence and to promote the general welfare of all the people of the United States. But the states reserved to themselves complete and sovereign control over their own internal affairs. The states are, therefore, exempt from all interference on the part of the national government in the management of those affairs. Accordingly, the Supreme Court of the United States has stated as 'impregnable positions', that a State of the Union has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States; that, by virtue of this it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and each act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated; that all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal* police, are not thus surrendered or restrained; that consequently, in relation to these, the authority of a State is complete, unqualified and exclusive; *and that, among these powers, are inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the State, and to prevent the introduction or enforce the removal of prohibited articles of commerce.*"

Judge Brannon in his work on the Fourteenth Amendment, at page 167, makes the following statement:

> "Those great powers vested in a state and its subordinate agencies, such as counties, cities,

towns or townships, called the police power, under which life, liberty and property may be taken, existed from the dawn of government, existed in the colonies at the date of the Declaration of Independence, and were always exercised by the states, notwithstanding clauses in their own constitutions declaring that no person should be deprived of life, liberty or property without due process of law, and the exercise of such powers by the states was always held to be entirely consistent with such constitutional provisions. THESE POWERS CANNOT PROPERLY BE CALLED EXCEPTIONS FROM THE CONSTITUTIONAL DEMAND OF DUE PROCESS OF LAW; FOR THEY ARE, IN THEMSELVES, DUE PROCESS, BECAUSE THEY ARE PROPER, USUAL, ORDINARY ACTION PURSUANT TO LAW, AND APPROPRIATE IN THE PARTICULAR CASE. When the Fourteenth Amendment came, it came, not to destroy rights existing in the states; it did not undertake even to define due process of law, or to declare or indicate what already were, or should thereafter be, legitimate powers of the state; it used only the common law expression 'due process of law,' as the legal phrase of common law import, as a thing preexisting. It neither originated, enlarged, nor narrowed that expression in its meaning. It simply declared that no state shall pass upon or affect the life, liberty or property of a person, except according to due process of law, WHATEVER THAT BE IN THE PARTICULAR CASE OR INSTANCE, TESTED BY THE EXISTING GENERAL LAW APPLICABLE ALIKE TO ALL. Plainly then this amendment does not touch or impair the lawful police power of the states; it does not create, narrow or widen police power, but leaves it as it was before the amendment came."

Again at page 175, the same author says:

"I am unable to see how that (Fourteenth) amendment wrought the slightest change in the police power of the state. It surely was not designed to take from the states the wonted necessary powers of government till then in-

herent in their sovereignty for governmental purposes. It created nothing new, defined nothing; simply required that state action be governed by due process of law; and acts legitimately within the police power are clearly due process. The sole question in each case is, IS THIS ACT ONE IN ITS NATURE AND CHARACTER AN ACT OF POLICE? If so, the Fourteenth Amendment does not affect it. If it does, the state is virtually expunged as a government."

In the case of *Barbier* v. *Connolly*, 113, U. S., 27, at page 31, Mr. Justice FIELD said:

"But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the *health*, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

In *Mugler* v. *Kansas*, 123 U. S., 623, where the Fourteenth Amendment is under discussion, the court speaking by Mr. Justice HARLAN, at page 664, said:

"It cannot be supposed that the States intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community."

And again at page 665:

"The principle that no person shall be deprived of life, liberty, or property, without due process of law, was embodied in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle,—equally vital, because essential to the peace and

safety of society,—that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

In *Fertilizing Co.* v. *Hyde Park*, 97 U. S., 659, Mr. Justice SWAYNE, speaking of the power of state to abate nuisances, at page 667, said:

> "We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases."

In the case of *In re Rahrer*, 140 U. S., 545, at page 554, the court, speaking by Mr. Chief Justice FULLER, said:

> "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the *public health*, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States and essentially exclusive.
>
> "And this court has uniformly recognized state legislation, legitimately for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the National government.
>
> "The Fourteenth Amendment, in forbidding a State to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest,

and did not attempt to invest Congress with power to legislate upon subjects which are within the domain of state legislation * * *.

"In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the national government, and that in this respect it is not interfered with by the Fourteenth Amendment."

In *Powell* v. *Pennsylvania*, 127 U. S., 678, at page 683, Mr. Justice HARLAN said:

"It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the *health* of the people and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the *public health* and the public morals, it cannot devest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States."

In *Patterson* v. *Kentucky*, 97 U. S., 501, at page 504, Mr. Justice HARLAN said:

"By the settled doctrines of this court, the police power extends, at least, to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government. The Kentucky Statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citi-

zens. It expresses in the most solemn form the deliberate judgment of the State that burning fluids which ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes. Whether the policy thus pursued by the State is wise or unwise, it is not the province of the national authorities to determine. That belongs to each State, under its own sense of duty, and in view of the provisions of its own Constitution. Its action, in these respects, is beyond the corrective power of this court."

Having in direct connection, after giving the definition of police power with all its amplifications, shown conclusively that the adoption of the Fourteenth Amendment does not deprive the several States of the valid exercise of that power within the territorial limits of the respective States, and that this power may be lawfully delegated to the various municipalities throughout the State, and it being conceded that in this case it has been so delegated, the next question for consideration is,

Whether this Particular Ordinance is a Valid and Proper Exercise of that Power.

Let us first consider the real test of the validity or legitimacy of the exercise of the police power by the state. We submit,

First. That the enactment must have for its object the prevention of some offense or manifest evil or the preservation of the public *health*, safety, morals or general welfare.

Second. That there must be some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof.

Third. That the provisions of the enactment do in plain, appreciable and appropriate manner tend toward the accomplishment of the object for which the power is exercised.

In the case of *Mugler* v. *Kansas*, 123 U. S., 623, at page 661, the court, speaking by Mr. Justice HARLAN, said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In the same case, at page 669, in speaking of the exercise of the police power by the state, Mr. Justice HARLAN said:

> "Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law."

In *Lawton* v. *Steele*, 152 U. S., 133, at page 136, Mr. Justice BROWN, after enumerating a large number of instances of the valid exercise of the police power said:

> "Beyond this, however, the state may interfere wherever the public interests demand it,

and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, BUT WHAT MEASURES ARE NECESSARY FOR THE PROTECTION OF SUCH INTERESTS. (Citing cases.) To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or interpose unusual or unnecessary restrictions upon lawful occupations."

The following statement of the rule for determining the validity of police regulations is given in Parker & Worthington's Public Health & Safety, at page 6:

"While, however, it is for the legislature to determine what laws or regulations are needed to protect the public health and to secure the public safety, and the exercise of its discretion in this respect is not the subject of judicial review; yet a statute, to be upheld as the valid exercise of the police power, must have some relation to those ends; the rights of citizens may not be invaded under the guise of a police regulation, for the protection of health or the promotion of the general security, where it is manifest, upon the face of the law, that such is not the true object of the legislation. And in whatever language the statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question, whether or not,

by its necessary or natural operation, it impairs or destroys rights secured by the fundamental law. IT IS THE DUTY OF THE COURT TO INQUIRE WHETHER THERE IS REAL AND SUBSTANTIAL RELATION BETWEEN ITS AVOWED OBJECTS AND THE MEANS DEVISED FOR OBTAINING THOSE OBJECTS."

In *Powell* v. *Pennsylvania*, 127 U. S., 678, at page 684, Mr. Justice HARLAN said:

"But it (the court) cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the Statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has in fact, no real or substantial relation to those objects. *Mugler* v. *Kansas*, 123 U. S., 623, 661. The court is unable to affirm that this legislation has no real or substantial relation to such objects."

In the case of *In re* Jacobs 98 N. Y., 98, at page 110, the court said:

"Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and WHILE ITS MEASURES ARE CALCULATED, INTENDED, CONVENIENT AND APPROPRIATE TO ACCOMPLISH THESE ENDS, THE EXERCISE OF ITS DISCRETION IS NOT SUBJECT TO REVIEW BY THE COURTS. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it

clearly relates to and is convenient and appropriate to promote the public health."

And at page 115:

"When a health law is challenged in the courts as unconstitutional, on the ground that it arbitrarily interferes with personal liberty and private property, without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end."

In *Jacobson* v. *Massachusetts*, 197 U. S., 11 the constitutionality of a compulsory vaccination law was before this court for decision. Eminent counsel urged that the law providing for compulsory vaccination upon the order of the board of health was unreasonable, arbitrary and effective only in the protection of law breakers (page 16); and that the board of health was entrusted with arbitrary powers and determines the necessity for and the methods of vaccination, and plaintiff's right thereto without a hearing, thus depriving him of his liberty without due process of law (page 17).

In deciding that the law was a valid exercise of the police power and not unconstitutional, after discussing the police power of the State, at page 27, the court, speaking by Mr. Justice HARLAN, said:

"Applying these principles to the present case, it is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in somebody; and surely

it was appropriate for the legislature to refer that question, in the first instance, to a Board of Health, composed of persons residing in the locality affected and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual nor an unreasonable or arbitrary requirement. Upon the principle of self defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease, which threatens the safety of its members."

Again, after discussing opposing theories as to the necessity and effectiveness of vaccination as a preventive of disease, the court, at page 30, said:

"We must assume that when the statute in question was passed the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The State Legislature proceeded upon the theory which recognized vaccination as at least an effective if not the best known way in which to meet and suppress the evils of a small-pox epidemic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action, in respect of a matter affecting the general welfare, it can only be when that which the legislature

has done comes within the rule that if 'a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.' *Mugler* v. *Kansas*, 123 U. S., 623, 661; *Minnesota* v. *Barber*, 136 U. S., 313, 320; *Atkin* v. *Kansas*, 191 U. S., 207, 223.

"Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of small-pox, can any one confidently assert that the means prescribed by the State to that end has no real or substantial relation to the protection of the public health and the public safety."

In *Gardner* v. *Michigan*, 199 U. S., 325 in speaking of the methods of disposition of garbage, Mr. Justice HARLAN, at page 332, said:

"We do not, of course, express any opinion as to these matters, and refer to them only in order to bring out the thought that the question before the Municipal authorities of Detroit was one in respect of which there was room for difference of views as to what means were best for the protection of the public health. Looking at the matter in a practical light, we are unable to say that the means devised by the City Council and indicated by its action were plainly unreasonable or unnecessary or did not have a real, substantial relation to the protection of the public."

In *City of Chicago* v. *Netcher*, 183 Ill., 104, at page 111, the court said:

"In order to sustain legislative interference with the business of the citizen by virtue of the

> police power it is necessary that the act should have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power the court must be able to see that it tends, in some degree, toward the prevention of offenses or the preservation of the public health, morals, safety or welfare. It must be apparent that some such end is the one actually intended and that there is some connection between the provisions of the law and such purpose."

We therefore respectfully submit that inasmuch as provision is made in the ordinance for the summary *destruction* of the condemned food and the city could not reap any possible financial benefit by causing such destruction.

First. That the ordinance was enacted for the preservation of the public health.

Second. That the summary destruction is the only method to absolutely insure preservation of health to the entire community, and is the only method feasible in a large city with the certainty of thousands of inspections during a single year; the countless delays in judicial proceedings; the inability of the city to preserve all condemned foods seized, and the inability of the city to detail three men for every day of time elapsing from the date of inspection until a final judicial determination could be had.

Third. That the provisions of the ordinance do in plain appreciable and appropriate manner tend toward the preservation of the public health and that it is for that reason and that alone that the power is being exercised.

Summary Destruction of Unwholesome Food Products.

As the summary destruction referred to in our *Second* conclusion is the only issue in this case, we desire to further amplify our previous argument by directing the court's attention to the fact that the destruction provided for in this ordinance is intended to reach *only* condemned food products in the most advanced stages of deterioration in that they must be PUTRID, and DECAYED, and POISONED, and INFECTED. We contend that food products when in such condition are a nuisance *per se* and can unquestionably be destroyed without the formality of a judicial determination.

> Freund on Police Power, Section 520, says: "Rotten or decayed food or meat, infected bedding or clothing, mad dogs, animals affected with contagious diseases, obscene publications, counterfeit coin, and eminently dangerous structures are the most conspicuous instances of nuisances *per se*."

The same author says, Section 521:

> "Since a nuisance *per se is* a source of present and continuing danger its destruction does not require previous notice to the owner. The rightfulness of the destruction presupposes, however, that the condition of the property is as a matter of fact harmful or objectionable, and the *ex parte* finding of the authorities does not determine this fact conclusively against the owner. If he cannot get his hearing in advance, he must get it afterward, *i. e.*, he has a right to bring an action for the destruction of his property and the authorities who are sued must justify their act. If the property proves to have been sound and harmless, the owner is entitled to compensation."

In *Lawton v. Steele*, 152 U. S., 133, at page 135, Mr. Justice BROWN said:

> "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and TO JUSTIFY THE DESTRUCTION OR ABATEMENT, BY SUMMARY PROCEEDINGS, OF WHATEVER MAY BE REGARDED AS A PUBLIC NUISANCE."

In discussing this phase of the case counsel has certainly succeeded in waxing quite eloquent by neglecting to confine himself to the issues actually presented by the record and permitting his imagination to soar at precipitous heights in observing that

> "If this ordinance is valid representatives of the Health Department of the City of Chicago may, at any moment appear at the cold storage plant of the appellants, may demand instant admission, and may instantly, upon being admitted to the plant, condemn every dollar's worth of the food products therein contained, which, under the demurrers, is admitted to be of the value of $2,000,000, and may instantly seize and utterly destroy every dollar's worth of said property. No notice of any kind or character, no opportunity to be heard before any body on any question of fact whatsoever."
>
> (Appellant's Brief, 20.)

And again:

> "If this ordinance is valid the health commissioner of the City of Chicago may, by his arbitrary *ex parte* decree render unwholesome that which is wholesome, may be prosecutor judge, jury and executioner in one, and by denying to the owner an opportunity to be heard, may destroy thousands or hundreds of

thousands of dollars' worth of perfectly wholesome food products," etc., etc., etc., etc.

(Appellant's Brief, 57.)

Counsel seem to entirely overlook the fact that such action is not contemplated or justified by the ordinance. The right to destroy is explicitly limited and reserved to "PUTRID, DECAYED, POISONED AND INFECTED FOOD." This does not even mean food that the inspectors may think or even honestly believe is putrid, decayed, poisoned and infected; it must in fact and truth be "PUTRID, DECAYED, POISONED AND INFECTED," and if the officers claiming to proceed under the ordinance should destroy food which was NOT IN FACT PUTRID, DECAYED, POISONED AND INFECTED, the act of the officers is a tort, and appellant's remedy is in a proceeding at law in the State court, instead of in this Court, there being no diversity of citizenship.

Appellant cannot invoke the jurisdiction of this Court by speculating on what might within the widest range of human experience take place. Why stop here? Why not also suppose the officer might set fire to the premises, kill the President of the Company and steal the contents of the office vaults? But fortunately by multiplying the supposed offenses, appellant's rights in this case are not thereby increased in the same ratio.

This case is before this Honorable Court on demurrer and if appellant desires to invoke the rule that the demurrer admits all that is well pleaded in the bill and the amendment thereto, then the court must accept appellant's statement made in the bill that the forty-seven barrels of chickens involved

here were not putrid, decayed, poisoned and infected, but were sound, healthful wholesome and fit for human consumption, and if that is to be accepted as the actual and truthful statement of the facts, then the face of the record shows that the alleged acts of the Commissioner and his Inspectors was tortious outside of the rights granted by the ordinance and entirely without warrant or authority and the Court must assume that the officers proceeded in their private and individual capacity and not under the ordinance, and this Court is therefore without jurisdiction to extend any relief for the tortious acts.

What counsel undoubtedly started out to contend for, before his enthusiasm carried him into such deep water, is that even though the condemned food is putrid, decayed, poisoned, infected, rancid, rotten, worm-eaten, death-breeding and germ-spreading, still the officers are absolutely without authority to destroy such condemned food because the ordinance does not provide for a judicial determination of the unwholesomeness of such food before it is in fact destroyed.

In *Powell v. Pennsylvania*, 127 U. S., 678, the court, in sustaining the validity of a statute prohibiting the manufacture of oleomargarine, at page 685, said:

> "Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health, as to require, for the protection of the people, the entire suppression of the business, rather than its regula-

tion in such manner as to permit the manufacture and sale of articles of that class which do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as IT DOES NOT APPEAR UPON THE FACE OF THE STATUTE, OR FROM ANY FACTS OF WHICH THE COURT MUST TAKE JUDICIAL COGNIZANCE, THAT IT INFRINGES RIGHTS SECURED BY THE FUNDAMENTAL LAW, THE LEGISLATIVE DETERMINATION OF THOSE QUESTIONS IS CONCLUSIVE UPON THE COURTS. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the Legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. * * * The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk, or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. IF ALL THAT CAN BE SAID TO THIS LEGISLATION IS THAT IT IS UNWISE, OR UNNECESSARILY OPPRESSIVE TO THOSE MANUFACTURING OR SELLING WHOLESOME OLEOMARGARINE, AS AN ARTICLE OF FOOD, THEIR APPEAL MUST BE TO THE LEGISLATURE, OR TO THE BALLOT BOX, NOT TO THE JUDICIARY. THE LATTER CANNOT INTERFERE WITHOUT USURPING POWERS COMMITTED TO ANOTHER DEPARTMENT OF GOVERNMENT.

"It is argued, in behalf of the defendant that

> if the statute in question is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property. BUT THE POSSIBILITY OF THE ABUSE OF LEGISLATIVE POWER DOES NOT DISPROVE ITS EXISTENCE. THAT POSSIBILITY EXISTS EVEN IN REFERENCE TO POWERS THAT ARE CONCEDED TO EXIST."

In *People* v. *Darston*, 119 N. Y., 569 at page 578, the court said:

> "If it cannot be made to appear that a law is in conflict with the Constitution by argument deduced from the language of the law itself, or from matters of which a court can take judicial notice, then the act must stand. The testimony of experts or other witnesses is not admissible to show that in carrying out a law enacted by the legislature, some provision of the Constitution may possibly be violated. * * * If the act upon its face is not in conflict with the Constitution then extraneous proof cannot be used to condemn it. The history and origin of the enactment we are now considering may very properly be referred to, to test its validity, and ascertain its true intent and proper interpretation. It has been said that courts will place themselves in the situation of a legislature, and by ascertaining the necessity and probably objects of the passage of a law, give effect to it, if possible, according to the intention of the law makers, when that can be done without violating any constitutional provision."

In cases where discretionary power has been conferred upon persons or boards to grant or withhold permission to carry on a trade or business which is subject to regulation under the police power, IT HAS BEEN HELD THAT THERE IS NO PRESUMPTION THAT THE POWER THUS CONFERRED WILL BE ARBITRARILY VIOLATED,

AND THAT IT IS PRESUMED THAT PUBLIC OFFICIALS WILL DISCHARGE THEIR DUTIES HONESTLY AND IN ACCORDANCE WITH RULES OF LAW.

Lieberman v. *Van De Carr*, 199 U. S., 552; 173 N. Y., 440.

Gundling v. *Chicago*, 117 U. S., 183.

In *Compagnie Francaise, etc.*, v. *Board of Health*, 186 U. S., 380, the court upheld the constitutionality of a statute which empowered the state board of health, in its discretion, to prohibit the introduction into any infected portion of the state, of persons acclimated, or unacclimated, or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of disease. At page 392, the court said:

> "It is earnestly insisted that the statute, whose constitutionality is assailed, is, on its face, not a regulation, but an absolute prohibiton against interstate commerce, and it is sought to sustain this contention by various suggestions as to the wrong which may possibly arise from a perversion and an abuse by the state authorities of the power which the statute confers. Thus it is said, what is an infectious and contagious disease is uncertain, and involves a large number of maladies. How many cases of such maladies are essential to cause a place to be considered as infected with them is left to the determination of the Board of Health. THAT BOARD, IT IS ARGUED, MAY THEN ARBITRARILY, UPON THE EXISTENCE OF ONE OR MORE CASES OF ANY MALADY WHICH IT MAY DEEM TO BE INFECTIOUS OR CONTAGIOUS, DECLARE ANY GIVEN PLACE IN THE STATE, OR EVEN THE WHOLE STATE OF LOUISIANA, INFECTED, AND PROCEED TO ABSOLUTELY DEBAR ALL INTERSTATE OR FOREIGN COMMERCE WITH THE STATE OF LOUISIANA. True it is, as said in *Morgan* v. *Louisiana*, *Ubi. Sup.*: 'In all cases of this kind it has been repeatedly

held that, when the question is raised whether the state statute is a just exercise of State power, or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose.' (Citing cases.)

"BUT THIS IMPLIES THAT WE ARE TO CONSIDER THE STATUTE AS ENACTED AND THE NATURAL RESULTS FLOWING FROM IT. IT DOES NOT IMPORT THAT WE ARE TO HOLD A STATE STATUTE UNCONSTITUTIONAL BY INDULGING IN CONJECTURE AS TO EVERY CONCEIVABLE HARM WHICH MAY ARISE OR WRONG WHICH MAY BE OCCASIONED BY THE ABUSE OF THE LAWFUL POWERS WHICH A STATUTE CONFERS. IT WILL BE TIME ENOUGH TO CONSIDER A CASE OF SUCH SUPPOSED ABUSE WHEN IT IS PRESENTED FOR CONSIDERATION."

Notice and a Hearing Before the Summary Abatement of a Nuisance is not Necessary.

In McGhee on Due Process of Law, at page 372, the author says:

"Necessity, not to dispense with altogether, but to postpone hearing, may exist in the case of the destruction of houses in the path of a conflagration *or of infected articles or animals.* Delay, before the destruction of the property condemned, for the purpose of giving notice, and it may be to ascertain who are the parties whose interests will be affected, and further delay for such hearing as the parties may think necessary for the protection of their interests, *might defeat all beneficial results from the contemplated action.* Having regard to the necessities of this class of cases then, and adjusting the requirements of notice and hearing to it it is held that local authorities may, *when the necessities of the case justify this action, proceed to condemn property and destroy it as a nuisance in advance of notice or a hearing.*

But the property owner has a right to have a judicial determination of the validity of the regulation and the existence of the nuisance upon a review of the matter in the courts. The *ex parte* determination of the local authorities cannot be made conclusive.

"When authority is given to municipal legislative boards or local officials to regulate the use of property and to abate as nuisances infractions of their regulations, they are, according to most authorities, said to be vested with a *quasi*-judicial or judicial authority the valid exercise of which depends as a jurisdictional fact on the actual existence of the nuisance. Their authority is to declare a nuisance where the facts warrant it, and not to determine that the lawful possession of inoffensive property is a nuisance. This leaves open a judicial inquiry to which hearing is a necessary requisite. In abating a nuisance under such an order, local boards or officers act at their peril, and if it is proved that they have overstepped the bounds of reasonable police action, the order will be no protection to them. When they are in doubt whether the order is within their authority, they may always have the matter determined in advance by the courts in a proceeding to restrain or abate the nuisance. *But they need not do so, and the exigencies of the situation may justify immediate action.*"

In *People* v. *Board of Health*, 140 N. Y., 1; 23 L. R. A., 481, the board of health determined that certain dams and ponds were nuisances and injurious to the public health, and ordered the dams removed. The owner of the dams instituted a proceeding by certiorari to review the order of the board. In discussing the power of boards of health to proceed summarily to abate a nuisance, the court speaking by EARL, J., said:

"A careful examination of the two acts (authorizing the board of health to abate nuisances) shows that there is no provision for a hearing before the board on the part of any person who is charged with maintaining a nuisance upon his premises. The right to such a hearing is not expressly given, and cannot be implied from any language found in either act, or from the nature of the subjects dealt with in the acts. *Boards of health and other like boards act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a termination.* There is no provision in the acts for calling or swearing witnesses, and there is no general law giving the power to do so. * * *

"The question may be asked, how could these provisions conferring power upon boards of health to interfere with and destroy property, and to impose penalties and create crimes, stand with the constitution securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must be that they could not stand if we were obliged to hold that the acts referred to made the determinations of the board of health as to the existence of nuisances final and conclusive upon the owners of the premises where they are alleged to exist. Before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the party proceeded against must have a hearing, not as a matter of favor, but as a matter of right; and the right to a hearing must be found in the acts. *Stewart* v. *Palmer*, 74 N. Y., 183; 30 Am. Rep., 289. As we have said there is no provision of law giving any party a right to a judical hearing before these

boards, and there is no provision making their determination final. If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many ways hold his property subject to the judgment of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions. Boards of health, under the acts referred to, cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance unless there be in fact a nuisance. It is the actual existence of a nuisance which gives them jurisdiction to act. Their acts declaring nuisances may be presumptively valid until questioned or assailed, for the same reasons which give presumptive legality to the acts of official persons under the 'maxim *omnia praesumuntur legitime facta donec probetur in contrarium.*' What operation, then, does the order or ordinance of the board of health have under these acts? The nuisance actually existing, and the jurisdiction having been regularly exercised, the order or ordinance has all the operation and effect provided in the act, and the persons who abate a nuisance have the protection which they would not have as private persons abating, not a private nuisance especially injurious to them, but a public nuisance injurious to the general public. It may be said that if the determination of a board of health as to a nuisance be not final and conclusive, then the members of the board, and all persons acting under their authority in abating the alleged nuisance act at their peril; and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property as a nuisance unless they know it to be such, and, if there be doubt whether it be a nuisance or not, the board should proceed by action to re-

strain or abate the nuisance, and thus have the protection of a judgment for what it may do.

"It may further be asked, what, under this view of the law, is the remedy of the owner of property threatened with destruction or actually destroyed as a nuisance? He may have his action in equity to restrain the destruction of his property if the case be one where a court of equity under equitable rules has jurisdiction, or he may bring a common law action against all the persons engaged in the abatement of the nuisance to recover his damages, and thus he will have due process of law; and, if he can show that the alleged nuisance does not in fact exist, he will recover judgment notwithstanding the ordinance of the board of health. Thus the views we take of these acts and similar acts conferring powers upon local officers to proceed summarily upon their own view and examination furnish adequate protection to boards of health, to the public and to property owners, and while these views are not supported by all the decided cases upon the subject, they have the support of the best reasons and of ample authority."

After discussing and quoting from a number of authorities, the court said:

"The result of these authorities is that whoever abates an alleged nuisance, and thus destroys or injures private property, or interferes with private rights, whether he be a public official or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril; and when his act is challenged in the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy, and is founded on fundamental constitutional principles.

"The way is now clear to the disposition of this case. The board of health did act and had a right to act, upon its own inspection and

knowledge of the alleged nuisance. It was not obliged to hear any party. It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by certiorari."

In Parker & Worthington's Public Health and Safety, at Section 175, it is stated that

> "It must not be inferred that the board of health is required in every instance, to proceed upon notice and a hearing in abating nuisances, or that they will necessarily be liable for damages if they do not so proceed. In respect to particular nuisances, it is intended that their action shall be prompt and summary. They are thus clothed with an extraordinary power and a most important duty. It is their right and duty to abate every nuisance injurious to the public health by summary measures. This cannot be done by any other agency, except that of an individual who may happen to be especially and peculiarly injured by the nuisance, and even he can only abate it to the extent necessary to protect his own rights. In exercising the remedy, however, the authorities assume the burden of showing that the character of the nuisance is such as to justify their action, but they are aided in this by the presumption that their acts are rightly done, and this presumption is sufficient to resolve in their favor every doubt as to the necessity or propriety of their action."

In *City of Salem* v. *Eastern R. Co.*, 98 Mass., 431, an action was brought to recover money expended by the city to drain certain dams and ponds declared by the board of health to be a nuisance. In discussing the right of boards of health to summarily abate a nuisance without notice or hearing, the court, at page 443, said:

"Their action is intended to be prompt and summary. They are clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health, and it is important that their proceedings should be embarrassed and delayed as little as possible by the necessary observance of formalities. Although notice and opportunity to be heard upon matters affecting private interests ought always to be given when practicable yet the nature and object of these proceedings are such that it is deemed to be most for the general good that such notice should not be essential to the right of the board of health to act for the public safety. Delay for the purpose of giving notice involving the necessity either of public notice or of inquiry to ascertain who are the parties whose interests will be affected, and further delay for such hearings as the parties may think necessary for the protection of their interests, might defeat all beneficial results from an attempt to exercise the powers conferred upon boards of health. There are many cases in which powers of determination and action, of a *quasi*-judicial character, are given to officers entrusted with duties of of local or municipal administration, by which not only the property but the lives of individuals may be affected, and which, from their nature, must be exercised, finally and conclusively, without a hearing or even notice to the parties who may be affected."

The defendants contended that the plaintiffs could not recover because they had not proved the existence of the nuisance or, if it existed, that it was caused by the defendants. The plaintiffs contended that the finding of the board of health was conclusive of the existence of the nuisance. As to these contentions, the court at page 447, said:

"But the court are of opinion that, in a suit to recover expenses incurred in removing a

> nuisance, when prosecuted against a party on the ground that he caused the same, but who was not heard, and had no opportunity to be heard upon the questions before the board of health, such party is not concluded in the findings or adjudications of that board, and may contest all the facts upon which his liability is sought to be established."

In *Miller* v. *Horton et al.*, 152 Mass., 540, an action was brought for killing the plaintiff's horse. The defendants admitted the killing, but justified the act under order of the board of health which declared that the horse had the glanders and directed it to be killed. The court in holding that the decision of the board of health was not conclusive as to whether or not the horse was diseased, at page 543, said:

> "Of course, there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the Legislature may authorize its destruction in such emergencies without a hearing beforehand. But it does not follow that it can throw the loss upon the owner without a hearing. If he cannot be heard beforehand he may be heard afterward. The statute may provide for paying him in case it should appear that his property was not what the Legislature has declared to be a nuisance and may give him his hearing in that way. If it does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them."

In *Stone* v. *Heath*, 179 Mass., 385, the local board of health was required by statute to examine into, destroy, remove or prevent "all nuisances, sources of filth and causes of sickness" within the town. The plaintiff brought a bill to restrain the board of

health from abating a nuisance and from instituting proceedings against the plaintiff on account of his failure to abate the nuisance. The court, at page 386, said:

> "The adjudication that there was a nuisance on the plaintiff's premises was in the very first part of February, almost in midwinter. The nuisance, if there was one, consisted, it is alleged, of decayed and partially decayed and rotten vegetable matter,—stumps, roots, bushes, limbs, and perhaps peat and muck. This matter was on land which was then several feet above the lake and likely to continue so, it is alleged, except for some unusual flow of water. Taking the time of year and the nature and situation of the alleged nuisance into account, it is somewhat difficult to understand how the board of health could have come to the conclusion that there was a nuisance or how there could have been any danger of pollution to the water supply.
>
> "But the board of health has adjudged that a nuisance existed and has ordered it to be abated by the plaintiffs. And the question is whether they can be restrained either under the general equity powers now vested in the Superior Court or otherwise from entering on the premises and abating the alleged nuisance if the plaintiffs do not abate it as ordered, and from instituting proceedings against the plaintiffs on account of their failure or neglect to comply with the order of abatement. And we are of opinion that they cannot be so restrained. The board of health acted, it is apparent, under Pub. Sts., c. 80, Secs. 20 *et seq.*, and not under Sec. 28 of the same chapter. The jurisdiction conferred by these provisions is summary in its nature and the objects to be attained by its exercise would be defeated, in many, if not most cases if the orders of boards of health were subject to judicial examination and revision at the instance of parties affected by

them before they could be carried into effect. *Belcher* v. *Farrar*, 8 Allen. 325. *Salem* v. *Eastern R. Co.*, 98 Mass., 431. *Taunton* v. *Taylor*, 116 Mass., 254, 260. *Cambridge* v. *Munroe*, 126 Mass., 496, 502.

"The decision of the board of health is not, however, in such cases final and conclusive to all purposes in regard to the parties interested in the question whether the thing complained of was a nuisance. (Citing cases.)

"It establishes, for the time being, that there is a nuisance, and those who act under the orders of the board of health in abating it are protected thereby while engaged in the performance of the duty thus imposed. (Citing cases.) But they act at their peril if it turns out in subsequent proceedings that there was in fact and in law no nuisance. (Citing cases.)

"And the question whether there was a nuisance, or whether, if there was one, it was caused or maintained by the parties charged therewith, may be litigated by such parties in proceedings instituted against them to recover the expenses of the abatement, or may be litigated by the parties whose property has been injured or destroyed in proceedings instituted by them to recover for such loss or damage, and may also be litigated by parties charged with causing or maintaining a nuisance in proceedings instituted against them for neglect or failure to comply with the orders of the board of health directing them to abate the same. (Citing cases.)

"It follows, we think, from what has been said that the Superior Court had re[illegible]power under its general equity jurisdiction to inquire into the question whether there was a nuisance and to enjoin the board of health if it should turn out that in the judgment of that court there was none."

In *Health Department* v. *Rector*, 145 N. Y., 32, the court, in upholding a statute relating to the City

of New York which required that upon the order of the board of health water should be furnished to each floor of tenement houses, at page 48, said:

> "Where property of an individual is to be condemned and abated as a nuisance it must be that somewhere betweeen the institution of the proceedings and the final result the owner shall be heard in the courts upon that question, or else that he shall have an opportunity when calling upon those persons who destroyed his property to account for the same, to show that the alleged nuisance was not one in fact. No decision of a board of health, even if made on a hearing can conclude the owner upon the question of nuisance."

In *Lowe* v. *Conroy*, 120 Wis., 151, an action was brought against the health officer for destroying beef and hides which he had determined to be infected with anthrax, a highly contagious disease, it having been subsequently found that the articles destroyed were not in fact so infected. Upon the question of the summary abatement of nuisance the court, at page 155, said:

> "Neither the statutes nor the ordinances of the city for the preservation of the public health make provision for a hearing before the board or otherwise of the person charged with maintaining a nuisance, source of filth, or cause of sickness. The board or its members or officers may abate and remove the nuisance, source of filth, or cause of sickness without any such hearing, even though such proceeding necessitates the destruction of private property.
>
> "The statutes were unquestionably framed upon the fact that such boards must act immediately and summarily in cases of the appearance of, contagious and malignant diseases, which are liable to spread and become epidemic causing destruction of human life. Under

such circumstances, it has been held that the legislature under the police power can rightfully grant to the boards of health authority to employ all necessary means to protect the public health, and, if necessary, go to the extent of destroying private property when the emergency demands. *Bittenhaus* v. *Johnson*, 92 Wis., 588, 66 N. W., 805; *Salem* v. *E. R. Co.*, 98 Mass., 431; *Lawton* v. *Steele*, 119 N. Y., 226, 23 N. E., 878; s. c., 152 U. S., 133, 14 Sup. Ct., 499. The power to summarily abate nuisances was fully recognized and established as a principle of the common law upon the ground that the requirement of preliminary formal legal proceedings and a judicial trial would result in defeating the beneficial objects sought to be attained. Within this principle 'quarantine and health laws have been established from time to time from the organization of state governments, authorizing the summary destruction of imported cargo, clothing, or other articles by officers designated, and no doubt has been suggested as to their constitutionality.'" (Citing cases.)

In respect to the right of the owner of the property to bring an action to recover for property which has been destroyed by the health officers, the court, at page 156, said:

"Respondent insists that he has the legal right to recover his damages since the property was not in fact a nuisance, source of filth, or a cause of sickness, as contemplated by the statute for the preservation and protection of the public health. This presents the inquiry whether the determination of the health officers that a nuisance or cause of sickness dangerous to health *in fact* existed is a final determination, binding upon respondent as owner of the property which the health officer decided must be destroyed in order to abate the nuisance and remove the cause of sickness.

"The statute, as stated, makes no provision giving the party proceeded against for such a nuisance or cause of sickness an opportunity to be heard before his property may be destroyed. While such a determination has been held to be a full protection to all persons acting under it in carrying out the purposes of the law—that is, to abate, and, if necessary, destroy, that which is in fact a nuisance or source of danger to health—yet it is no protection for destroying private property which *in fact* is no such nuisance or source of danger. This is upon the ground that due process of law requires that the owner be given an opportunity to be heard at a trial before his private property can be adjudged forfeited for his misconduct, or for the protection of the public health. He cannot be deprived of the right, either before or after such taking of his property, to have a judicial inquiry whether *in fact* he has forfeited the right to his property by coming within the condemnation of the law. In such cases, where a board of health has summarily destroyed property, the owner may bring his action to recover the damages sustained, if it be found he has been unjustifiably deprived of it. In the absence of judicial inquiry wherein the owner is given full opportunity to establish that no nuisance or cause of sickness exists as claimed, the board of health cannot declare a thing a nuisance or source of danger to public health which is not so in fact. Their authority to act is bottomed upon the actual existence of the conditions which the statutes declare they may abate or remove." (Citing cases.)

In the recent case of *Daniels* v. *Homer*, 139 N. C., 219, it was held that fishing in certain waters when prohibited by law is a public nuisance and the General Assembly has the power to authorize a prompt abatement of the nuisance by seizure and sale of the nets subject to the right of their owner to con-

test the fact of his violation of the law by a proceeding of "claim and delivery, or by injunction to prevent sale, or by action to recover the proceeds of sale and damages."

In the note following *Blue* v. *Beach*, 80 Am. St. Rep., 212 at page 218, the author says:

> "It would seem that some of the courts have failed to distinguish between the question of the necessity of giving notice before a board of health can declare a thing to be a nuisance, and the question of the conclusiveness of such a declaration. The two questions are quite distinct. In the interest of the public health boards should be given power to summarily act without notice. The public health might suffer or be impaired if their action could be delayed until a protracted hearing could be brought to a termination. But this does not mean that their action is conclusive on the question whether a nuisance exists or not. Every person is entitled to a hearing as a matter of right, and the fact that a board of health declares anything a nuisance does not make it such. A board of health may, without notice, declare a nuisance, but such a declaration cannot be final and conclusive until after the property owner has had a hearing, and if the board orders the abatement of such alleged nuisance it acts at its peril."

In *Egan* v. *Health Department*, 20 Misc., 38, 45 N. Y. Supp., 325, it was held that a board of health could order a tenement house to be vacated, because of its unsanitary condition, without notice to the owner, and the court points out that the notion that the board cannot take action without giving previous notice to the parties affected, rests upon the mistaken assumption that the determination of the health authorities is final and conclusive.

In the note following *Blue* v. *Beach*, *supra*, the author in discussing *Hutton* v. *Camden*, 39 N. J. L., 122, makes the following statement (page 220):

> "In some of the cases in which it has apparently been held that the legislature cannot confer upon boards of health power to declare nuisances without notice to the persons affected the decision was unnecessary to the proper disposition of the case. Thus in *Hutton* v. *Camden*, 39 N. J. L., 122, 23 Am. Rep., 203, it appeared that the board of health declared certain property to be a nuisance and ordered it filled up, and the order not being complied with, the municipal authorities did the work and sued for the expense incurred. Now, it is obvious from what has been said that the declaration by the board of health that the property was a nuisance is not conclusive upon the property owner, and therefore in this suit to recover for the cost of abating the nuisance the question as to whether a nuisance actually existed or not could be litigated. Thus the property owner is protected and has not been deprived of his property without due process of law. But it was unnecessary for the court to go further and say that the proceedings of the board were absolutely void in the absence of notice to the property owner. It was unnecessary in order to protect the property owner and equally so to sustain the decision, for the decision would have been the same if the court had merely held that the order was not conclusive on the question of the existence of a nuisance. Of course, the view for which we are contending requires the board of health to act at its peril, and this is undoubtedly the rule."

In *Pearson et al.* v. *Zehr*, 138 Ill. 40, an action was brought against the state board of live stock commissioners to recover damages for the killing of certain horses. The commissioners justified the killing upon the ground that they were acting under a

statute which authorized them to kill and destroy domestic animals suffering from contagious and infectious diseases, and that they believed the horses were diseased with glanders. On behalf of the commissioners it was urged their action under the statute was conclusive and final and that they were not liable in damages. The court, holding that the determination of the commissioners was not conclusive and final, at page 51, said:

> "The statute does not afford, and does not purport to afford, immunity to the commissioners, or to their agents and servants, in the event they slay live stock which has been negligently or erroneously determined by the board to be sick with a contagious or infectious malady, or to have been exposed to such contagion. It is the fact of such disease or of exposure thereto which under the statute, gives the power, and without the fact exists the slaughter of the animals is not an act done under authority of law. In the case at bar it is no justification of that which was done that the commissioners acted in good faith—that there were reasonable grounds for the belief that some of the horses were diseased with glanders and that others of them had been exposed to that contagion, and that they made or caused to be made an honest and careful investigation and examination, to the best of their ability, and as a result thereof decided and determined that some of said horses were so diseased and that others of them had been so exposed. It is to be borne in mind that the act of 1885 makes no provision for compensation for animals killed by mistake, and which are not diseased with a contagious or infectious disease, or for paying the value of animals slaughtered upon an erroneous supposition that they had been exposed to such disease, and also makes no provision for a suit or proceeding wherein, after proper notice to the owner of domestic animals supposed to be

stricken with a contagious or infectious malady, and an opportunity afforded him to be heard and to introduce his witnesses, there can be a judicial ascertainment of the fact of the existence or non-existence of such disease or exposure thereto, and that there is no pretense here of any such ascertainment of the fact or facts. To permit the commissioners to determine, *ex parte*, that some of the horses had the glanders and that others had been exposed thereto, and to hold that determination a justification for slaughtering the horses, without imposing upon appellants the burden of establishing affirmatively the actual existence of such disease and such exposure would not be a valid exercise if the police power of the State, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law. In the late case of *Miller* v. *Horton et al.*, 152 Mass., 540, it was held by the supreme judicial court of Massachusetts that under a statute of that state providing that 'in all cases of farcy or glanders, the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed, without appraisement,' the order of the commissioners affords no defense to an action by the owner for compensation, against those who executed it, unless the animal killed is in fact infected with farcy or glanders."

In *State* v. *Main*, 69 Conn., 123 there was an information for a violation of a statute relating to "peach yellows." From a verdict and judgment of guilty the defendant appealed. Counsel for defendant urged that the statute was unconstitutional because a speedy and summary action was not required for the public safety and health, and because it deprived the defendant of his property without due process of law. In upholding the constitutionality of the law, the court, at page 136, said:

"Police legislation for the extirpation of a disease of such (contagious) a nature, which the legislative department deems dangerous to the public welfare, cannot be pronounced invalid by the judicial department by reason of any difference of opinion, should one exist, between these two agencies of government, as to the probability of such danger. If the law may be an appropriate means of protecting the public health and the agricultural interests of the State, it is for the legislature alone to determine as to its adoption. It may have been the opinion of the General Assembly that peach growers in general would abandon their business from dread of contagion from orchards infected by the yellows. In such a case, whether their apprehensions were well-founded or ill-founded would be immaterial, unless it also appeared that there could be no reasonable grounds for them. A widespread apprehension throughout the community justifies itself, and is a sufficient basis for legislative action towards the removal of the cause, real or supposed, of the danger apprehended, when this cause is a deadly disease of a food producing tree. *Bissell* v. *Davidson*, 65 Conn., 183, 191. The destruction of the infected trees by order of a public official, after due inspection is a remedy which, however severe, IS ONE APPROPRIATE TO THE END IN VIEW, AND MAY PROPERLY BE ENFORCED WITHOUT ANY PRELIMINARY JUDICIAL INQUIRY, as well as without any compensation to the owner for resulting loss. *State* v. *Wordin*, 56 Conn., 216, 226; *Powell* v. *Pennsylvania*, 127 U. S., 678, 685."

Also, at page 138 the court said:

"Summary proceedings for the abatement of whatever is dangerous to the public health or safety are often necessary, and have always been permitted when authorized by appropriate legislation. *Raymond* v. *Fish*, 51 Conn., 80, 97. If, indeed, the trees which the defendant was

ordered to destroy did not in fact have the yellows, he was justified in disobeying the order. As to this he was entitled to demand a trial by jury; and he has had one, in which the question was properly submitted to their determination." (Citing cases.)

In *Gaines* v. *Waters*, 64 Ark., 609, an action was brought to enjoin the defendants from tearing down and removing a certain house which had been declared to be a nuisance dangerous to the health of the city, by the board of health, and which the board had ordered to be removed. In the course of the opinion the court, at page 612, said:

"The contention that the city council could not delegate to the board of health the power to determine judicially that a certain structure or other thing is or is not a nuisance has no bearing on the case, for the reason that the council itself had no such power, nor does the board of health, in abating nuisances, exercise judicial powers, within the usual meaning of such term. There is no requirement that parties interested shall be given notice and an opportunity to be heard, nor does the statute contemplate a judicial hearing before the city council or board of health in matters of this kind. The language of the statute is that municipal corporations shall have power to cause 'any nuisance to be abated.' There is no authority to destroy property not a nuisance, and the resolution of a board of health that a house is a nuisance does not make it a nuisance unless it be one in fact nor is such resolution a judicial determination of that question. *Ward* v. *Little Rock*, 41 Ark., 526; *Cole* v. *Kegler*, 64 Ia., 59; 1 Dillon Municipal Corporations, Sec. 374.

"It follows, therefore, as a matter of common prudence, that in summary proceedings by a city council or board of health to abate a

> nuisance, when the opposing party has no opportunity to be heard, great caution should be exercised that property may not be unnecessarily destroyed; and, further, for the reason that if it should turn out that a house declared by either of those bodies to be a nuisance was not such in fact, and its removal unnecessary, those removing it might become liable for an action in damages. *Cole* v. *Kegler*, 64 Ia., 59; *McKibbin* v. *Ft. Smith*, 35 Ark., 352."

Counsel has devoted a great deal of space to arguing that this ordinance is a contravention of the Fourteenth Amendment, because the summary destruction of the condemned property "would deprive his client of due process of law."

It is submitted that the question to be primarily determined in this case is whether the ordinance is a valid and legitimate exercise of the police power, and not a question of the denial of due process of law, for if the ordinance was passed in the valid and legitimate exercise of the police power of the state, that in and of itself is due process of law. To quote again from Brannon on the Fourteenth Amendment, at page 167, where the author discusses the police power of the states:

> "These powers cannot properly be called exceptions from the constitutional demand of due process of law; *for they are, in themselves, due process, because they are the proper, usual, ordinary action pursuant to law, and appropriate in the particular case.*"

Counsel, on page 15 of their brief, quote from *Booth* v. *The People*, 186 Ill., 43, page 48, but they do not quote far enough. We wish to direct the Court's attention to their quotation and also that part which immediately follows it:

"This power is known as the police power of the State. In the exercise of this power the general assembly may, by valid enactments,—*i. e.*, 'due process of law,'—prohibit all things hurtful to the comfort, safety and welfare of society, even though the prohibition invade the right of liberty or property of an individual. (18 Am. & Eng. Ency. of Law, 739, 740; *Town of Lake View* v. *Rose Hill Cemetery Co.*, 70 Ill., 191.) An enactment to have that effect and be valid must be an appropriate measure for the promotion of the comfort, safety and welfare of society. IT MUST BE, IN FACT, A POLICE REGULATION. Courts are authorized to interfere and declare a statute unconstitutional, or not the 'law of the land,' if it conflicts with the constitutional rights of the individual and does not relate to or is not an appropriate measure for the promotion of the comfort, safety and welfare of society.

* * * * *

"The language of the constitutional provision is so chosen as to recognize the right of the State to deprive a citizen of life, liberty or property by 'due process of law.' Due process of law is synonymous with 'law of the land,' hence the law of the land may expressly prohibit and make criminal the doing of an act which, in the absence of such law of the land would constitute a liberty or property right within the meaning of the constitution, even though such act be not within itself immoral."

The only question which was decided by his Honor Judge Kohlsaat, and the only question before this court is, whether the ordinance was passed under a valid and legitimate exercise of the police power. If it was passed under such valid and legitimate exercise of the police power, it cannot be said to be in any sense a denial of due process of law; FOR A VALID EXERCISE OF THE POLICE POWER OF THE STATE IS IN ITSELF DUE PROCESS OF LAW.

Counsel seem to labor under the impression that the inspectors' finding is final, complete, absolutely binding and not subject to review by a judicial proceeding, and therefore the destruction of the property authorized by the ordinance does not give to the owner his constitutional guaranty of "due process of law." While it is true the owner does not have the right of a direct review by certiorari, he nevertheless has a right of action against the inspectors who condemned and destroyed the food, and in that proceeding the inspectors are required to justify their condemnation and ultimate destruction, being in effect a complete hearing and trial of the merits of the case by a judicial tribunal, and if the owner can prove that the condemned food was wholesome and fit for human consumption he is entitled to judgment against the inspectors for the damages sustained; but as the authorities cited by us touching that feature of the proceeding and dealing with the enforcement of health laws of this nature, are so conclusive, we refrain from further amplification or a discussion of them.

Having found it impractical to answer appellant's brief in the order which counsel presented their case we have prepared our brief and argument on an entirely independent basis, and as most of their citations are so manifestly immaterial and not in point on the real issue in this case, we have not deemed it necessary to take up each individual citation for analysis and distinction but have preferred, in the interest of space and time, to simply cumulate authorities on the particular issue and its various branches. There is, however, one point in their

brief relative to property rights in decayed food, because of their value for manufacturing or commercial purposes (Appellant's Brief, 56), to which we desire to specifically reply by adopting the words of Mr. Justice HARLAN in the opinion delivered by the court in the case of *Gardner* v. *Michigan*, 199 U. S., 325-332:

> "Touching the suggestion that garbage and refuse are valuable for the manufacture of merchantable grease and other products it is sufficient, in view of what we have said in the other case, to remark that it was a controlling obligation of the city, which it could not properly ignore, to protect the health of its people in all lawful ways having relation to that object; and if, in its judgment, fairly and reasonably exercised, the presence of garbage and refuse in the city, on the premises of householders and otherwise, would endanger the public health, by causing the spread of disease, then it could rightfully require such garbage and refuse to be removed and disposed of, even if it contained some elements of value. In such circumstances, the property rights of individuals in the noxious materials described in the ordinance must be subordinated to the general good. If it be said that the city might have adequately guarded the public health and at the same time saved the property rights of its owner on whose premises garbage and refuse were found, the answer is that the city evidently thought otherwise, and we cannot confidently say that its constituted authorities went beyond the necessities of the case and exceeded their proper functions when they passed the ordinance in question. Those ordinances cannot, therefore, according to well-settled principles, be held to be wanting in the due process of law required by the constitution."

In conclusion we respectfully submit that the ordinance under consideration is not in conflict with the provisions for the due process of law in the Fourteenth Amendment to the Constitution of the United States, and is a proper and valid exercise of the police power granted to the City of Chicago, and that the judgment of the trial court should therefore be affirmed.

Respectfully submitted.

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NORTH AMERICAN COLD STORAGE COMPANY, APPELLANT, *v.* CITY OF CHICAGO *et al.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 28. Argued November 13, 1908.—Decided December 7, 1908.

A municipal ordinance properly adopted under a power granted by the state legislature is to be regarded as an act of the State within the Fourteenth Amendment.

Where the Circuit Court has sustained the demurrer to the complaint because the case does not involve the construction or application of the Constitution of the United States and has given a certificate to

that effect, and complainant has also appealed directly to this court under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, if this court finds that jurisdiction exists, the appeal can be heard without resort to the certificate and decided on the merits. *Giles* v. *Harris*, 189 U. S. 475.

Under its police power the State has the right to seize and destroy food which is unwholesome and unfit to use, and, in exercising such a power, due process of law, within the meaning of the Fourteenth Amendment, does not require previous notice and opportunity to be heard; the party whose property is destroyed has a right of action after the act which is not affected by the *ex parte* condemnation of the state officers.

Where, under the police power of the State, the legislature may enact laws for the destruction of articles prejudicial to public health, it is, to a great extent, within its discretion as to whether any notice and hearing shall be given; and the fact that the articles might be kept for a period does not give the owners a right to notice and hearing.

The right of the State under the police power to destroy food that is unfit for human consumption is not taken away because some value may remain in it for other purposes, when it is kept to be sold at some time as food. *Reduction Company* v. *Sanitary Works*, 199 U. S. 306; *Gardner* v. *Michigan*, 199 U. S. 325.

The provisions in the cold storage ordinances of Chicago for destruction of unsafe and unwholesome food, are not unconstitutional as depriving persons of property without due process of law because they do not provide for notice and opportunity to be heard before such destruction, or because the food destroyed might have some value for other purposes than food.

THE bill of complaint in this case was dismissed by the Circuit Court for want of jurisdiction, and a certificate of the Circuit Judge was given that the jurisdiction of the court was in issue, and the question of jurisdiction alone was certified to this court, under paragraph 2 of § 5 of the act of March 3, 1891 (26 Stat. 826, chap. 517). The appellant also appealed, and now asserts its right of appeal under paragraph five of the same section of the above act, on the ground that the case involves the construction or application of the Constitution of the United States, and hence may be brought directly to this court from the decision of the Circuit Court.

The bill was filed against the city of Chicago and the various individual defendants in their official capacities—Commissioner of Health of the city of Chicago, Secretary of the Department of Health, Chief Food Inspector of the Department of Health and inspectors of that department, and policemen of the city—for the purpose of obtaining an injunction under the circumstances set forth in the bill. It was therein alleged that the complainant was a cold storage company, having a cold storage plant in the city of Chicago; and that it received, for the purpose of keeping in cold storage, food products and goods as bailee for hire; that on an average it received $20,000 worth of goods per day, and returned a like amount to its customers, daily, and that it had on an average in storage about two million dollars' worth of goods; that it received some forty-seven barrels of poultry on or about October 2, 1906, from a wholesale dealer in due course of business, to be kept by it and returned to such dealer on demand; that the poultry was, when received, in good condition and wholesome for human food, and had been so maintained by it in cold storage from that time, and it would remain so, if undisturbed, for three months; that on October 2, 1906, the individual defendants appeared at complainant's place of business and demanded of it that it forthwith deliver the forty-seven barrels of poultry for the purpose of being by them destroyed, the defendants alleging that the poultry had become putrid, decayed, poisonous or infected in such a manner as to render it unsafe or unwholesome for human food. The demand was made under § 1161 of the Revised Municipal Code of the city of Chicago for 1905, which reads as follows:

"Every person being the owner, lessee or occupant of any room, stall, freight house, cold storage house or other place, other than a private dwelling, where any meat, fish, poultry, game, vegetables, fruit, or other perishable article adapted or designed to be used for human food, shall be stored or kept, whether temporarily or otherwise, and every person having charge of, or being interested or engaged, whether as principal

or agent, in the care of or in respect to the custody or sale of any such article of food supply, shall put, preserve and keep such article of food supply in a clean and wholesome condition, and shall not allow the same, nor any part thereof, to become putrid, decayed, poisoned, infected, or in any other manner rendered or made unsafe or unwholesome for human food; and it shall be the duty of the meat and food inspectors and other duly authorized employés of the health department of the city to enter any and all such premises above specified at any time of any day, and to forthwith *seize*, condemn and destroy any such putrid, decayed, poisoned and infected food, which any such inspector may find in and upon said premises."

The complainant refused to deliver up the poultry, on the ground that the section above quoted of the Municipal Code of Chicago, in so far as it allows the city or its agents to seize, condemn or destroy food or other food products, was in conflict with that portion of the Fourteenth Amendment which provides that no State shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

After the refusal of the complainant to deliver the poultry the defendants stated that they would not permit the complainant's business to be further conducted until it complied with the demand of the defendants and delivered up the poultry, nor would they permit any more goods to be received into the warehouse or taken from the same, and that they would arrest and imprison any person who attempted to do so, until complainant complied with their demand and delivered up the poultry. Since that time the complainant's business has been stopped and the complainant has been unable to deliver any goods from its plant or receive the same.

The bill averred that the attempt to seize, condemn and destroy the poultry, without a judicial determination of the fact that the same was putrid, decayed, poisonous or infected, was illegal, and it asked that the defendants, and each of them, might be enjoined from taking or removing the poultry from

the warehouse, or from destroying the same, and that they also be enjoined from preventing complainant delivering its goods and receiving from its customers in due course of business the goods committed to its care for storage.

In an amendment to the bill the complainant further stated that the defendants are now threatening to summarily destroy, from time to time, pursuant to the provisions of the above-mentioned section, any and all food products which may be deemed by them, or either of them, as being putrid, decayed, poisonous or infected in such manner as to be unfit for human food, without any judicial determination of the fact that such food products are in such condition.

The defendants demurred to the bill on the ground, among others, that the court had no jurisdiction of the action. The injunction was not issued, but upon argument of the case upon the demurrer the bill was dismissed by the Circuit Court for want of jurisdiction, as already stated.

Mr. L. A. Stebbins, with whom *Mr. W. H. Sears* was on the brief, for appellant:

If the trial court misconstrued the true definition of the word jurisdiction and therefore erred in dismissing the case for want of jurisdiction, then the case is still appealable direct to this court under par. 6 of § 5 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826. In this event the certificate of the trial court becomes surplusage, and this court will consider the case upon its merits. *Giles* v. *Harris,* 189 U. S. 475.

That notice, and an opportunity to be heard, shall precede the taking of life, liberty or property is a principle absolutely fundamental in every system of constitutional government. *Rex* v. *Cambridge Univ.,* 1 Stra. 558, 565; *Bradstreet* v. *Neptune Ins. Co.,* 3 Sumn. (U. S.) 600.

The police power of the several States is subject to constitutional limitations. *Mugler* v. *Kansas,* 123 U. S. 623; *Booth* v. *People,* 186 Illinois, 43; McGeehee on Due Process,

305; *Central of Ga. R. R. Co.* v. *Murphy*, 196 U. S. 194; *Reid* v. *Colorado*, 187 U. S. 137; *Lake Shore & Michigan Southern Ry. Co.* v. *Smith*, 173 U. S. 684; *Dobbins* v. *Los Angeles*, 195 U. S. 223.

Section 1161 of the Revised Municipal Code of the city of Chicago denies due process of law, in that it authorizes the destruction of property without any provision whatever for notice to the owner thereof, or to the bailee holding the same in cold storage, and without any opportunity whatsoever for any hearing, of any kind or character, before any person or official upon the question whether the said property is, in fact, dangerous to the public health. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Pennoyer* v. *Neff*, 95 U. S. 714; McGeehee on Due Process of Law, 58, 73; *Galpin* v. *Page*, 18 Wall. 350; *King* v. *Hayes*, 80 Maine, 206; *Edson* v. *Crangle*, 62 Ohio St. 49; *Varden* v. *Mount*, 78 Kentucky, 86; *Jeck* v. *Anderson*, 57 California, 251; *Lowry* v. *Rainwater*, 70 Missouri, 152; *Weil* v. *Ricord*, 24 N. J. Eq. 169; *Hutton* v. *Camden*, 39 N. J. L. 122, 132.

There was no emergency calling for the immediate destruction of the property here in question, because the property could have remained in the cold storage warehouse in an unchanged condition until a hearing could have been had, after due notice. The court should take judicial notice of the nature and purpose of cold storage warehouses, as bearing on the alleged necessity for the destruction of the poultry involved in this proceeding.

The remedy suggested in the case of *Lawton* v. *Steele*, 152 U. S. 133, could not be applied in a case like the present, because by the destruction of the property all possible evidence of its character would be destroyed with it, and it would be impossible for the aggrieved owners to prove the wholesome character of their goods, and a suit against the offending officers would therefore be without success.

As decayed food products are still valuable for certain purposes, other than as food, there can be no justification for their

destruction; they are entitled to the same protection under the Constitution as other property.

Mr. Emil C. Wetten, with whom *Mr. George W. Miller* and *Mr. Edward J. Brundage* were on the brief, for appellees:

It is impossible to frame any definition of police power by absolutely indicating definite limits to its exercise, but each case which arises must be decided in accordance with the merits of the particular case. For the general principles governing the question see 22 Am. & Eng. Ency. of Law, 2d ed., 915; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33; *Leisy* v. *Hardin*, 135 U. S. 100, 128; Parker & Worthington's Public Health & Safety, 2; Brannon on Fourteenth Amendment, 167, 175; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Mugler* v. *Kansas*, 123 U. S. 623, 664, 665; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667; *In re Rahrer*, 140 U. S. 545, 554; *Powell* v. *Pennsylvania*, 127 U. S. 678, 683; *Patterson* v. *Kentucky*, 97 U. S. 501, 504.

The ordinance is a valid and proper exercise of police power. *Mugler* v. *Kansas*, 123 U. S. 623, 661, 669; *Lawton* v. *Steele*, 152 U. S. 133, 136; Parker & Worthington, 6; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684; *In re Jacobs*, 98 N. Y. 98, 115; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 27, 30; *Gardner* v. *Michigan*, 199 U. S. 325, 332; *City of Chicago* v. *Netcher*, 183 Illinois, 104, 111.

Under the police power the summary destruction of unwholesome food products is a proper exercise of official discretion. Freund, Police Power, §§ 520, 521; *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *People* v. *Durston*, 119 N. Y. 569, 578; *Compagnie Francaise &c.* v. *Board of Health*, 186 U. S. 380, 392.

A notice and hearing before the summary abatement of a nuisance is not necessary. McGeehee on Due Process, 372; *People* v. *Board of Health*, 140 N. Y. 1; *S. C.*, 23 L. R. A. 481; Parker & Worthington, § 175; *Salem* v. *Eastern R. R. Co.*, 98 Massachusetts. 431, 443; *Miller* v. *Horton et al.*, 152 Massachusetts,

540, 543; *Stone* v. *Heath*, 179 Massachusetts, 385, 386; *Health Department* v. *Rector*, 145 N. Y. 32; *Lowe* v. *Conroy*, 120 Wisconsin, 151, 155, 156; *Daniels* v. *Homer*, 139 N. C. 219; *Blue* v. *Beach*, 80 Am. St. Rep. 212, 218; *Egan* v. *Health Department*, 20 Misc. 38; *S. C.*, 45 N. Y. Supp. 325; *Pearson et al.* v. *Zehr*, 138 Illinois, 40, 51; *State* v. *Main*, 69 Connecticut, 123, 136, 138; *Gaines* v. *Waters*, 64 Arkansas, 609, 612; *Booth* v. *People*, 186 Illinois, 43, 48.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court.

In this case the ordinance in question is to be regarded as in effect a statute of the State, adopted under a power granted it by the state legislature, and hence it is an act of the State within the Fourteenth Amendment. *New Orleans* v. *Sugar Co.*, 125 U. S. 18, 31.

The Circuit Court held that the defendants being sued in their official capacities could not be held for acts or threats which they had no power or authority under the ordinance to make or perform; that, although it was alleged that the defendants acted under the provisions of the section of the code already quoted, yet that under no possible construction of that ordinance could the defendants claim the right to the entire stoppage of the business of the complainant in storing admittedly wholesome articles of food, so that it would seem that these acts were mere trespasses, and plainly without the sanction of the ordinance; as to these acts, therefore, the remedy was to be pursued in the state courts, there being no constitutional question involved necessary to give the court jurisdiction.

The court further held that the allegation that the intention to seize and destroy the poultry without any judicial determination as to the fact of its being unfit for food was in violation of the Fourteenth Amendment, could not be sustained; that such Amendment did not impair the police power of the

State, and that the ordinance was valid and not in violation of that Amendment. The demurrer was therefore sustained and the bill dismissed, as stated by the court, for want of jurisdiction.

We think there was jurisdiction and that it was error for the court to dismiss the bill on that ground. The court seems to have proceeded upon the theory that, as the complainant's assertion of jurisdiction was based upon an alleged Federal question which was not well founded, there was no jurisdiction. In this we think that the court erred. The bill contained a plain averment that the ordinance in question violated the Fourteenth Amendment, because it provided for no notice to the complainant or opportunity for a hearing before the seizure and destruction of the food. A constitutional question was thus presented to the court, over which it had jurisdiction, and it was bound to decide the same on its merits. If a question of jurisdiction alone were involved, the decree of dismissal would have to be reversed. The complainant, however, has, in addition to procuring the certificate of the court as to the reason for its action, also appealed from the decree of dismissal directly to this court under the fifth paragraph of § 5 of the act of 1891. Such appeal can be heard without resort to the certificate and may be decided on its merits. *Giles* v. *Harris*, 189 U. S. 475, 486. A constitutional question being involved, an appeal may be taken directly to this court from the Circuit Court.

Holding there was jurisdiction in the court below, we come to the merits of the case. The action of the defendants, which is admitted by the demurrer, in refusing to permit the complainant to carry on its ordinary business until it delivered the poultry, would seem to have been arbitrary and wholly indefensible. Counsel for the complainant, however, for the purpose of obtaining a decision in regard to the constitutional question as to the right to seize and destroy property without a prior hearing, states that he will lay no stress here upon that portion of the bill which alleges the unlawful and forcible

taking possession of complainant's business by the defendants. He states in his brief as follows:

"There is but one question in this case, and that question is, Is section 1161 of the Revised Municipal Code of Chicago in conflict with the due process of law provision of the Fourteenth Amendment, in this, that it does not provide for notice and an opportunity to be heard before the destruction of the food products therein referred to? If there is no such conflict the ordinance is valid for the purposes of Federal jurisdiction; the bill states no cause of action, and was properly dismissed, as there is no claim of any such diversity of citizenship as would confer jurisdiction upon the Federal court, and no such jurisdiction exists, except by reason of the claim, that such ordinance is in conflict with the Fourteenth Amendment."

The general power of the State to legislate upon the subject embraced in the above ordinance of the city of Chicago, counsel does not deny. See *Reduction Company* v. *Sanitary Works*, 199 U. S. 306, 318. Nor does he deny the right to seize and destroy unwholesome or putrid food, provided that notice and opportunity to be heard be given the owner or custodian of the property before it is destroyed. We are of opinion, however, that provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use, is not necessary. The right to so seize is based upon the right and duty of the State to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to so seize and destroy is, of course, based upon the fact that the food is not fit to be eaten. Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance, and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it. A determination on the part of the seizing officers that food is in an unfit condition to be eaten is not a decision which con-

cludes the owner. The *ex parte* finding of the health officers as to the fact is not in any way binding upon those who own or claim the right to sell the food. If a party cannot get his hearing in advance of the seizure and destruction he has the right to have it afterward, which right may be claimed upon the trial in an action brought for the destruction of his property, and in that action those who destroyed it can only successfully defend if the jury shall find the fact of unwholesomeness as claimed by them. The often cited case of *Lawton* v. *Steele*, 152 U. S. 133, substantially holds this. By the second section of an act of the legislature of the State of New York of 1880 it was provided that any "net . . . for capturing fish which was floated upon the water or found or maintained in any of the waters of the State," in violation of the statutes of the State for the protection of fish, was a public nuisance, and could be abated and summarily destroyed, and that no action for damages should lie or be maintained against any person for or on account of seizing or destroying such nets. Nets of the kind mentioned in that section were taken and destroyed by the defendant, and the owner commenced action against him to recover damages for such destruction. That portion of the section which provided that no action for damages should lie was applicable only to a case where the seizure or destruction had been of a nature amounting to a violation of the statute, and of course did not preclude an action against the person making a seizure if not made of a net which was illegally maintained. The seizure and destruction were justified by the defendant in the action, and such justification was allowed in the state courts (119 N. Y. 226) and in this court. Mr. Justice Brown, in delivering the opinion of this court, said:

"Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the

defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey, in a similar case (*Am. Print Works* v. *Lawrence*, 21 N. J. Law, 248, 259): 'The party is not, in point of fact, deprived of a trial by jury. . . .' Indeed it is scarcely possible that any actual injustice could be done in the practical administration of the act."

The statute in the above case had not provided for any hearing of the question of violation of its provisions and this court held that the owner of the nets would not be bound by the determination of the officers who destroyed them, but might question the fact by an action in a judicial proceeding in a court of justice. The statute was held valid, although it did not provide for notice or hearing. And so in *People &c.* v. *Board of Health*, 140 N. Y. 1, the question arose in a proceeding by certiorari, affirming the proceedings of the board of health of the city of Yonkers, by which certain dams upon the Nepperhan River were determined to be nuisances and ordered to be removed. The court held that the acts under which the dams were removed did not give a hearing in express terms nor could the right to a hearing be implied from any language used in them, but that they were valid without such provision, because they did not make the determination of the board of health final and conclusive on the owners of the premises wherein the nuisances were allowed to exist; that before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the parties proceeded against must have a hearing, not as a matter of favor, but as a matter of right, and the right to a hearing must be found in the acts; that if the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions. It was said that boards of health under the acts referred to could not, as to any existing state of facts, by their

determination make that a nuisance which was not in fact a nuisance; that they had no jurisdiction to make any order or ordinance abating an alleged nuisance unless there were in fact a nuisance; that it was the actual existence of a nuisance which gave them jurisdiction to act. There being no provision for a hearing the acts were not void nevertheless, but the owner had the right to bring his action at common law against all the persons engaged in the abatement of the nuisance to recover his damages, and thus he would have due process of law; and if he could show that the alleged nuisance did not in fact exist he will recover judgment, notwithstanding the ordinance of the board of health under which the destruction took place.

The same principle has been decided by the Supreme Judicial Court of Massachusetts. The case of *The City of Salem* v. *Eastern R. Co.*, 98 Massachusetts, 431, was an action brought to recover moneys spent by the city to drain certain dams and ponds declared by the board of health to be a nuisance. The court held that in a suit to recover such expenses incurred in removing a nuisance, when prosecuted against a party on the ground that he caused the same, but who was not heard, and had no opportunity to be heard upon the questions before the board of health, such party is not concluded in the findings or adjudications of that board, and may contest all the facts upon which his liability is sought to be established.

Miller v. *Horton*, 152 Massachusetts, 540, is in principle like the case before us. It was an action brought for killing the plaintiff's horse. The defendants admitted the killing but justified the act under an order of the board of health, which declared that the horse had the glanders, and directed it to be killed. The court held that the decision of the board of health was not conclusive as to whether or not the horse was diseased, and said that: "Of course there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the legislature may authorize its destruction in such emergencies without a hearing beforehand.

But it does not follow that it can throw the loss upon the owner without a hearing. If he cannot be heard beforehand he may be heard afterward. The statute may provide for paying him in case it should appear that his property was not what the legislature had declared to be a nuisance and may give him his hearing in that way. If it does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them."

And in *Stone* v. *Heath*, 179 Massachusetts, 385, the court held that under the statute it had no power to restrain the board of health from abating nuisances and from instituting proceedings against plaintiff on account of his failure to abate them, as provided for in the statute, because the board of health had adjudged that a nuisance existed and had ordered it to be abated by the plaintiff, yet still the question, "whether there was a nuisance, or whether, if there was, it was maintained by the one charged therewith might be litigated by such parties in proceedings instituted against them to recover the expenses of the abatement, or may be litigated by the parties whose property has been injured or destroyed in proceedings instituted by them to recover for such loss or damage, and may also be litigated by parties charged with causing or maintaining a nuisance in proceedings instituted against them for neglect or refusal to comply with the orders of the board of health directing them to abate the same." In that way they had a hearing and could recover or defend in case there was no nuisance.

See also *Lowe* v. *Conroy*, 120 Wisconsin, 151; *Pearson* v. *Zehr*, 138 Illinois, 48; *State* v. *Main*, 69 Connecticut, 123; *Gaines* v. *Waters*, 64 Arkansas, 609, 612, where the same principle is announced.

Complainant, however, contends that there was no emergency requiring speedy action for the destruction of the poultry in order to protect the public health from danger resulting from consumption of such poultry. It is said that the food was in cold storage, and that it would continue in the same con-

dition it then was for three months, if properly stored, and that therefore the defendants had ample time in which to give notice to complainant or the owner and have a hearing of the question as to the condition of the poultry, and as the ordinance provided for no hearing, it was void. But we think this is not required. The power of the legislature to enact laws in relation to the public health being conceded, as it must be, it is to a great extent within legislative discretion as to whether any hearing need be given before the destruction of unwholesome food which is unfit for human consumption. If a hearing were to be always necessary, even under the circumstances of this case, the question at once arises as to what is to be done with the food in the meantime. Is it to remain with the cold storage company, and if so under what security that it will not be removed? To be sure that it will not be removed during the time necessary for the hearing, which might frequently be indefinitely prolonged, some guard would probably have to be placed over the subject-matter of investigation, which would involve expense, and might not even then prove effectual. What is the emergency which would render a hearing unnecessary? We think when the question is one regarding the destruction of food which is not fit for human use the emergency must be one which would fairly appeal to the reasonable discretion of the legislature as to the necessity for a prior hearing, and in that case its decision would not be a subject for review by the courts. As the owner of the food or its custodian is amply protected against the party seizing the food, who must in a subsequent action against him show as a fact that it was within the statute, we think that due process of law is not denied the owner or custodian by the destruction of the food alleged to be unwholesome and unfit for human food without a preliminary hearing. The cases cited by the complainant do not run counter to those we have above referred to.

Even if it be a fact that some value may remain for certain purposes in food that is unfit for human consumption, the right to destroy it is not on that account taken away. The

small value that might remain in said food is a mere incident, and furnishes no defense to its destruction when it is plainly kept to be sold at some time as food. *Reduction Company* v. *Sanitary Works*, 199 U. S. 306–322; *Gardner* v. *Michigan*, 199 U. S. 325, 331.

The decree of the court below is modified by striking out the ground for dismissal of the bill as being for want of jurisdiction, and, as modified, is

Affirmed.

MR. JUSTICE BREWER dissents.